Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1999

PACIFIC LUMBER COMPANY, a Delaware corporation; SCOTIA PACIFIC COMPANY, LLC, a Delaware corporation; and SALMON CREEK CORPORATION, a Delaware corporation,

Petitioners,

v.

MARBLED MURRELET *(Brachyramphus marmoratus)*; NORTHERN SPOTTED OWL *(Strix occidentallis caurina)*; and ENVIRONMENTAL PROTECTION INFORMATION CENTER, INC.

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the neutrally-worded fee-shifting provision of the federal Endangered Species Act ("ESA"), 16 U.S.C. section 1540(g)(4), providing for a discretionary award of reasonable attorney and expert witness fees to "any party, whenever the court determines such award is appropriate" is to be governed by the dual standard favoring civil rights plaintiffs of *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), or by the evenhanded rule found applicable to neutrally-worded fee-shifting statutes in *Fogerty v. Fantasy Records, Inc.*, 510 U.S. 517 (1994).

PARTIES TO THE PROCEEDING

Petitioners, defendants below, are The Pacific Lumber Company, a Delaware corporation, Scotia Pacific Company, LLC, a Delaware corporation,[1] and Salmon Creek Corporation, a Delaware corporation.[2]

Respondents, plaintiffs below, are Marbled Murrelet *(Brachyramphus marmoratus)*, Northern Spotted Owl *(Strix occidentallis caurina)*, and Environmental Protection Information Center, Inc., a California corporation.

Defendants in the district court, who did not participate in the appellate proceedings below are Bruce Babbitt, Secretary, Department of the Interior; Mollie Beattie, Director, United States Fish and Wildlife Service; Michael Spear, Regional Director, United States Fish and Wildlife Service; and the United States Fish and Wildlife Service.

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1 Scotia Pacific Company, LLC is the successor in interest to Scotia Pacific Holding Company.

[2] Petitioners are subsidiaries or affiliate companies of the following corporations that have issued shares to the public: MAXXAM Inc.; MAXXAM Group, Inc.; MAXXAM Properties Inc.; Kaiser Aluminum and Chemical Corp.; and Kaiser Aluminum Corp. None of these entities are parties to this litigation.

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OPINIONS BELOW

The opinion of the court of appeals from which review is sought is reported at 182 F.3d 1091 (9th Cir. 1999). App. B at 3a-10a. The district court opinion from which that appeal was taken is unofficially reported at 1998 U.S. Dist. LEXIS 4266. App. C at 11a-28a. The opinion of the district court granting summary judgment in favor of petitioners is unofficially reported at 1997 U.S. Dist. LEXIS 9138. App. D at 29a-41a. The opinions of the court of appeals reversing the district court's issuance of preliminary injunctions are reported at *Marbled Murrelet v. Babbitt*, 111 F.3d 1447 (9th Cir. 1997) *("Marbled Murrelet II")* (App. E at 42a-46a) and *Marbled Murrelet v. Babbitt*, 83 F.3d 1068 (9th Cir. 1996) *("Marbled Murrelet I")*

(App. G at 74a-84a). The district court decisions from which the foregoing appeals were taken are, respectively, not reported (App. F at 47a-73a) and unofficially reported at 1996 U.S. Dist. LEXIS 13856 (App. H at 85a-89a).

JURISDICTION

The judgment of the court of appeals was entered on July 7, 1999. Petition for rehearing and rehearing *en banc* was filed on July 23, 1999, and denied on August 25, 1999. App. A at 1a-2a. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

STATUTORY PROVISION INVOLVED

This petition involves the fee-shifting portion of the citizen suit provision of the federal Endangered Species Act, 16 U.S.C. section 1540(g)(4).

> The court, in issuing any final order in any suit brought pursuant to paragraph (1) of this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

The entirety of the citizen suit provision, 16 U.S.C. section 1540(g), is reproduced in Appendix I at 90a-91a.

STATEMENT OF THE CASE

A. THE ISSUE

This case presents the question of what standard is to be applied under a neutrally-worded fee-shifting statute to the reasonable attorneys' fees request of a prevailing defendant in an environmental citizen suit where the defendant obtained a favorable ruling from the court of appeals on an important question that court concluded furthered the purposes of the governing statute. The statute in question—the federal Endangered Species Act ("ESA")—provides that "the court, in issuing any final order in any suit brought pursuant to paragraph (1) . . . may award costs of litigation (including

reasonable attorney and expert fees) to *any party*, whenever the court determines such award is *appropriate*." 16 U.S.C. § 1540(g)(4) (emphasis added). The court below, overruling an earlier Ninth Circuit opinion to the contrary,[1] concluded that the dual standard this Court held applicable to civil rights actions brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. section 2000e, *et seq.*, as articulated in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978) *("Christiansburg")*, is to be employed in awarding attorneys' fees in environmental cases. App. B at 8a-9a. The *Christiansburg* rule provides that prevailing plaintiffs ordinarily recover attorneys' fees unless special circumstances render such an award unjust. However, a prevailing defendant can recover attorneys' fees only where the action is found to be "unreasonable, frivolous, meritless or vexatious." *Id.* Indeed, under *Christiansburg* (endorsing this Court's earlier ruling in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968)), a successful civil rights plaintiff is ordinarily awarded attorneys' fees—even if the victory is only technical. *Christiansburg*, 434 U.S. at 416.

The court of appeals below ignored this Court's decision in *Fogerty v. Fantasy Records, Inc.*, 510 U.S. 517 (1994) *("Fogerty")*, which had rejected the Ninth Circuit's imposition of a dual standard on a neutrally-worded fee-shifting provision of the Copyright Act. In holding that an evenhanded approach is called for, *Fogerty* confined the *Christiansburg* dual standard to civil rights cases, in which it was deemed appropriate because of their unique historical background, and gave no hint that neutrally-worded fee-shifting statutes are to be similarly construed in other contexts.

Uncertainty and conflict exists among the circuits and within the lower courts as to whether—outside of the civil rights arena—the *Christiansburg* dual standard or the *Fogerty* rule of parity governs the award of attorneys' fees to a prevailing defendant under a neutrally-worded fee-shifting statute. Given the plethora of citizen suits[2] that

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[1] *See Carson-Truckee Water Conservancy District v. Secretary of the Interior*, 748 F.2d 523 (9th Cir. 1984), *cert. denied, Pyramid Lake Paiute Tribe v. Carson-Truckee Water Conservancy District*, 471 U.S. 1065 (1985) *("Carson-Truckee")*.

[2] The 1990s have witnessed an "explosive growth in the number of citizen suits." Ross MacFarlane and Lori Terry, *Citizen Suits: Impacts on Permitting and Agency Enforcement*, Nat. Resources & Env't 20, 20 (Spring 1997). This explosion has

have been filed in recent years under various environmental statutes that contain similarly worded attorneys' fees provisions manifesting no preference for plaintiffs or defendants,[3] clarification of the proper standard to be applied to successful defendants is called for.

B. THE UNDERLYING REGULATORY SCHEME

Petitioners The Pacific Lumber Company, Scotia Pacific Company, LLC[4] and Salmon Creek Corporation (collectively "PALCO") have, for many years, engaged in commercial timber harvesting operations on 200,000 acres of private property they own in Humboldt County, California. Among PALCO's timberlands are old-growth redwood forest stands that provide habitat for the marbled murrelet, listed as "threatened" under the federal ESA, 16 U.S.C. section 1531, *et seq.*, and the northern spotted owl, listed as "endangered" under the same Act.[5]

Commercial timber operations in California are comprehensively regulated by the Z'berg-Nejedly Forest Practice Act of 1973 ("FPA"), Cal. Pub. Res. Code § 4511, *et seq.*, and the Forest Practice Rules promulgated by the California Board of Forestry ("the Board") under that Act. *Marbled Murrelet I*, App. G at 76a-77a; *Marbled Murrelet II*, App. E at 44a. The FPA and its implementing regulations require that a person seeking to harvest timber must file a timber harvest plan ("THP") with the California Department of Forestry ("CDF"). Cal. Pub. Res. Code § 4581. The THP includes a formal harvesting plan that specifically details the areas to be harvested, how the area is to be

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occurred on top of the already substantial number of citizen suits filed in the 1980s. For example, between May 1984 and September 1988, more than 800 notices of intent to sue were filed under the Clean Water Act. Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 Tul. L. Rev. 339, 354 (1990).

[3] There are at least 16 federal statutes that contain provisions comparable to the ESA. *See Ruckelshaus v. Sierra Club*, 463 U.S. 680, 681 n.1 (1983).

[4] Scotia Pacific Company, LLC is successor in interest to Scotia Pacific Holding Company.

[5] Petitioners refer the Court to the statement of background of this case set forth in the district court's opinion granting summary judgment (App. D at 29a) and in the two Ninth Circuit decisions that preceded it—*Marbled Murrelet v. Babbitt*, 83 F.3d 1068 (9th Cir. 1996) (App. G at 74a) and *Marbled Murrelet v. Babbitt*, 111 F.3d 1447 (9th Cir. 1997) (App. E at 42a).

harvested, what protective measures are to be undertaken, an analysis of the impacts (both specific and cumulative), and mitigative measures to be followed with the proposed harvest. 14 Cal. Code Regs. § 896, *et seq.*

Prior to approval of a THP, the FPA provides for site inspections by appropriate professionals from CDF and other interested state and federal agencies, public notice and comment. Cal. Pub. Res. Code § 4582.6-4582.7. A THP cannot be approved if CDF determines that numerous criteria protective of the environment have not been satisfied. 14 Cal. Code Regs. § 1037.6.

A modified exemption procedure exists for persons who seek to harvest "dead, dying or diseased trees." *See* Cal. Pub. Res. Code § 4584; 14 Cal. Code Regs. § 1038(b). The exemption process involves the filing of an "exemption notice" rather than the formal plan associated with THPs. 14 Cal. Code Regs. § 1038(b). CDF thereafter reviews the notice and makes a determination as to whether it complies with the FPA. 14 Cal. Code Regs. § 1038(e).

In instances where a "threatened" or "listed" species under the ESA may exist within the areas to be harvested under either an exemption notice or THP, the Board has promulgated special regulations designed to assure that the proposed harvest will avoid a "take" of the species (an act that is prohibited by section 9 of the ESA, 16 U.S.C. § 1538(a)(1)(B)). *See* 14 Cal. Code Regs. § 919.9, *et seq.* The state regulations provide that one method to satisfy this requirement is for the U.S. Fish and Wildlife Service ("USFWS") to concur that the proposed plan will not "take" an endangered species. Cal. Code Regs. § 919.9(e). *Marbled Murrelet I,* App. G at 75a-76a; *Marbled Murrelet II.* App. E at 43a-44a.[6]

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[6] The USFWS, as the delegate of the Secretary of the Interior, and the National Marine Fisheries Service ("NMFS"), as the delegate of the Secretary of Commerce, are the federal agencies responsible for administration of the ESA. 50 C.F.R. § 402.1(b) (1998). USFWS has jurisdiction over terrestrial and inland aquatic species, while NMFS has jurisdiction over marine species. *Id.* at §§ 222.23(a) & 227.4 (1998). Section 7(a)(2) of the ESA requires federal agencies to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. § 1536(a)(2). Pursuant to this mandate, when a federal agency action may affect a threatened or endangered species, the agency must engage in a process known as "consultation" with either USFWS or NMFS, depending on which wildlife

Because the marbled murrelet and the northern spotted owl exist on PALCO's properties and could be affected by proposed exemption harvests and harvests pursuant to submitted THPs, PALCO is required to assure CDF that its proposed harvesting activities will not "take" either of the species. It can meet this requirement by providing to CDF written documentation that the USFWS finds its proposed plans acceptable. *Marbled Murrelet I,* App. G at 75a, 77a-78a; *Marbled Murrelet II,* App. E at 44a-46a.

In 1994 and 1995, PALCO submitted three exemption notices to harvest dead, dying or diseased timber throughout its property. App. D at 32a. During this same period of time, PALCO was processing eight THPs. App. D at 36a. CDF and the USFWS, upon reviewing the proposals, required modifications so as to avoid "taking" either the marbled murrelet or northern spotted owl. *Marbled Murrelet I,* App. G at 78a. After modification of the original plans, the USFWS provided written acceptance with respect to the exemption harvests and the THPs. *See* App. D at 32a-33a, 35a-36a.

C. THE LITIGATION BELOW

On September 15, 1995, respondent Environmental Protection Information Center, Inc. ("EPIC")—an environmental group that has been zealously seeking to shut down PALCO's harvesting activities for a number of years through a series of lawsuits[7]—filed an action on

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agency has jurisdiction over the species in question. 16 U.S.C. § 1536(a)(2); 50 C.F.R. part 402 (1998). Through the consultation process, the responsible wildlife agency determines whether the proposed action is likely to violate the jeopardy standard of ESA section 7(a)(2).

[7] As of January 1998, EPIC reported the following on its Internet site (http:\\www.wildcalifornia.org):

> We have filed 15 lawsuits involving the ancient and residual old-growth groves of the Headwaters forest and we have moved to intervene in Pacific Lumber's private property rights lawsuit against the United States of America. Many of our cases have been filed with the Sierra Club, individuals, or watershed groups as co-plaintiffs.

To these should be added EPIC's ongoing suit against the California Department of Forestry and Fire Protection and the California Department of Fish and Game challenging the legality, under state law, of the Habitat Conservation Plan/Sustained Yield Plan for Pacific Lumber's lands. Humboldt Co. Sup. Ct. Case No. CV-990445.

behalf of itself, the marbled murrelet and the northern spotted owl under the ESA and the National Environmental Policy Act ("NEPA"), 42 U.S.C. section 4321, *et seq.*, seeking a temporary restraining order and preliminary injunction enjoining PALCO from conducting logging activities in Humboldt County pursuant to the THPs and the exemption harvest notices. The Defendants were Bruce Babbitt, (Secretary, Department of the Interior), Mollie Beattie (Director, USFWS), Michael Spear (Region 1 Director, USFWS) and the USFWS, along with PALCO.

EPIC brought this action as a citizen suit under the ESA pursuant to 16 U.S.C. section 1540(g)(1), asserting that the written concurrences of the USFWS with respect to the exemption notices and THPs constituted "agency action" under section 7(a)(2) of the ESA, 16 U.S.C. section 1536(a)(2), and "major federal action" under NEPA requiring an environmental impact statement.[8] 42 U.S.C. § 4332(2)(C).

The essence of EPIC's section 7 claim was that the advice secured by PALCO from the USFWS as to how to avoid "take" in its implementation of the exemption harvests and THPs was "agency action" under section 7(a)(2) of the ESA that required compliance with the lengthy and complicated consultation process under that section, including preparation of a biological assessment and biological opinion before the harvesting could take place. *See Marbled Murrelet I*, App. G at 75a-76a; *Marbled Murrelet II*, App. E at 43a-44a.

On September 29, 1995, the district court granted a preliminary injunction with respect to the exemption notices. This ruling was appealed by PALCO to the Court of Appeals for the Ninth Circuit, which, on May 7, 1996, reversed and remanded. *Marbled Murrelet I*, App. G at 74a. The Ninth Circuit opinion addressed for the first time the question whether USFWS's advice to and consultation with a private party and a state agency with authority to regulate the private party actions in order to avoid the "take" of a listed species, constituted "agency action" *or* "major federal action." The court concluded that since there was no discretionary federal involvement

[8] EPIC also alleged that PALCO was "taking" marbled murrelets in violation of section 9 of the ESA. This latter claim was subsequently dismissed. App. C at 13a.

or control over the processing of exemption notices, the USFWS did not engage in "agency action" under section 7 of the ESA or "major federal action" under NEPA. *Marbled Murrelet I,* App. G at 79a-84a.

In ruling in favor of PALCO, the court of appeals agreed with PALCO's interpretation of section 7 of the ESA and NEPA, and found that this interpretation furthered the purposes of the ESA:

> Protection of endangered species would not be enhanced by a rule which would require a federal agency to perform burdensome procedural tasks mandated by section 7 simply because it had advised or consulted with a private party. Such a rule would be a distinct disincentive for the agency to give such advice or consultation. Moreover, private parties who wanted advice on how to comply with the ESA would be loath to contact the FWS for fear of triggering burdensome bureaucratic procedures. As a result, desirable communication between private entities and federal agencies on how to comply with the ESA would be stifled and protection of threatened and endangered species would suffer.

Marbled Murrelet I, App. G at 83a.

Following remand, the district court granted a new motion by EPIC for a preliminary injunction—this time with respect to the concurrence by the USFWS with the proposed THPs' avoidance of taking the northern spotted owl in compliance with PALCO's northern spotted owl plan. App. F at 72a-73a. Again, PALCO appealed to the Ninth Circuit, which vacated the preliminary injunction. *Marbled Murrelet II,* App. E at 42a. The court of appeals reiterated its conclusion, expressed in the earlier opinion, that consultation with the USFWS and its concurrence with the proposed plan did not constitute "agency action" triggering section 7 of the ESA or "major federal action" under NEPA. *Id.* at 43a-46a. The court clarified the important point that timber harvesting on private lands in California is not a matter within the purview of the federal government, but subject to exclusive state regulation. *Id.* at 45a.

Following the decision in *Marbled Murrelet II,* PALCO and the federal defendants filed motions for summary judgment. Those motions were granted on the basis of the guidance provided by the two Ninth Circuit opinions holding that the USFWS's participation

in PALCO's efforts to comply with the environmental laws and obtain approval from CDF to harvest timber did not constitute "agency action" under the ESA or "major federal action" under NEPA.[9] App. D at 40a-41a. Judgment was thereupon entered in favor of PALCO. App. D at 41a.

D. PALCO'S REQUEST FOR ATTORNEYS' FEES

Following dismissal of EPIC's claims and entry of judgment in favor of PALCO, PALCO sought litigation costs, including attorneys' fees, under 16 U.S.C. section 1540(g)(4),[10] on the ground that it was the prevailing party which successfully obtained a decision that made a substantial contribution to the interpretation of the ESA.

PALCO argued that the neutrally-worded fee-shifting provision of the ESA did not establish a different and more onerous standard for a prevailing defendant than for a successful plaintiff and that the dual standard this Court found applicable in suits brought by plaintiffs under Title VII of the Civil Rights Act of 1964, 42 U.S.C. section 706k, did not apply. *Christiansburg*, 434 U.S. 412 (1978). Rather, PALCO submitted, under the Ninth Circuit precedent of *Carson-Truckee Water Conservancy District v. Secretary of the Interior*, 748 F.2d 523 (9th Cir. 1984), *cert. denied, Pyramid Lake Paiute Tribe v. Carson-Truckee Water Conservancy District*, 471 U.S. 1065 (1985) *("Carson-Truckee")*, whether "any" party's claim for litigation costs is "appropriate" depends upon whether the party's litigation efforts were successful and "made a substantial contribution" to the interpretation or application of the ESA. PALCO further argued that this Court, in *Fogerty*, 510 U.S. 517 (1994), rejected an earlier effort by the Ninth Circuit to judge attorneys' fees claimed by prevailing defendants under a neutrally-worded fee-shifting provision by the Civil Rights Act's "dual standard":

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[9] With respect to the NEPA claim, the district court concluded that since the USFWS had not engaged in "agency action" under section 7 of the ESA, it followed that the USFWS had not engaged in a "major federal action" under NEPA's more exclusive standard. App. D at 40a-41a.

[10] "The court . . . may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate." 16 U.S.C. § 1540(g)(4).

> Thus, the Court replaces the "dual standard" adopted by the Ninth Circuit with an "evenhanded" approach under which district courts will apply the same standard to prevailing plaintiffs and defendants when deciding whether to award fees.

Id. at 536 (Thomas, J., concurring).

Lastly, PALCO pointed out that any question as to whether the ESA is to be given an evenhanded interpretation was resolved by this Court in *Bennett v. Spear*, 520 U.S. 154 (1997). There, in construing another portion of the same provision that allows fee-shifting under the ESA (16 U.S.C. § 1540(g)(1)), this Court construed "any person" to mean just that and determined that standing under the ESA is to be accorded in an evenhanded manner to parties who seek to enforce its environmental provisions against others, as well as those whose economic interests are subject to the bite of those very provisions. *Bennett,* 520 U.S. at 164-166.

The district court denied PALCO's request, concluding that "the Ninth Circuit has articulated that the *Christiansburg* standard applies to defendants acting with economic interests" and that standard requires defendants to establish that plaintiffs' lawsuit was "frivolous, unreasonable or without foundation" in order to qualify for an award of attorneys' fees. App. C at 19a, 18a. The court also rejected PALCO's argument that *Bennett v. Spear* precluded a distinction between litigants under the citizen suit provision of the ESA based upon their status or motivation, stating:

> There is no justification in *Bennett* for extending that ruling ["any party" in 16 U.S.C. § 1540(g)(1)] to [Pacific Lumber]'s motion for fees. This argument may be attractive on appeal, however, this court is bound by the Ninth Circuit's ruling in *Razore.*[11]

App. C at 19a n.6.

On appeal, the Ninth Circuit affirmed the district court, rejecting its own evenhanded "substantial contribution standard" articulated in

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[11] *Razore v. Tulalip Tribes*, 66 F.3d 236 (9th Cir. 1995), denied fees in a Clean Water Act ("CWA") and Resource Conservation and Recovery Act ("RCRA") case to a defendant who prevailed on a technicality.

Carson-Truckee, holding that the *Christiansburg* dual standard, applicable to civil rights claims, would now be the test to be applied to prevailing defendants in environmental cases where the applicable statute authorizes the district court to award reasonable attorney and expert witness fees "to any party, whenever ... appropriate," notwithstanding the neutral-wording of those fee-shifting provisions. App. B at 7a-9a.

REASONS FOR GRANTING THE WRIT

A. THIS COURT'S URGENT INTERVENTION IS NEEDED TO ELIMINATE CONFLICTS AND CONFUSION PREVAILING IN THE LOWER COURTS

The starting point for any discussion of the appropriate test governing the authority of a federal court to award attorneys' fees at the conclusion of litigation is that absent clear legislative direction to the contrary, the "American Rule" governs and neither party is entitled to an award of attorneys' fees. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247, 260-261 (1975). A long accepted exception applies if the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons. *Id.* at 259. As noted in *Alyeska*, 421 U.S. at 260 n.33, Congress has, over the years, made specific and explicit provisions for the shifting of attorneys' fees under selected statutes authorizing allowances in a variety of circumstances and often upon different tests. *Id.* at 260-261. In the environmental area alone, there are at least 16 federal statutes that contain fee-shifting provisions comparable to the ESA where no preference for plaintiffs or defendants is exhibited. *See Ruckelshaus v. Sierra Club*, 463 U.S. 680, 681 n.1 (1983) *("Ruckelshaus")*. This expression of parity by Congress is in line with this Court's view that the citizen suit provisions in many of the environmental statutes reveal a legislative intent to strike a balance between encouraging citizen enforcement and avoiding burdening federal courts with excessive numbers of citizen suits. *Hallstrom v. Tillamook County,* 493 U.S. 20, 28-29 (1989) *("Hallstrom")*.

Nothing in the statutory provision under consideration here—16 U.S.C. section 1540(g)(4), authorizing the award of reasonable

attorneys' fees to "any party . . . whenever the court determines such award is appropriate"—even remotely suggests anything other than an evenhanded, neutral approach is to be invoked. The same is true for many other environmental statutes containing similarly worded fee-shifting provisions. On the face of it, the rule of parity adopted by this Court in *Fogerty* should apply. However, this Court's earlier decision in *Christiansburg*, has been construed by many lower courts to authorize the application of the dual standard to neutrally-worded fee-shifting statutes outside of the civil rights field.[12] While this Court's subsequent decision in *Fogerty* would seem to have clarified the situation by limiting the dual standard to civil rights cases, many lower courts have persisted in ignoring the plain meaning of the fee-shifting statutes and have applied the *Christiansburg* rule.[13]

The decision below illustrates the confusion prevailing in the lower courts on the subject of awarding prevailing defendants attorneys' fees under fee-shifting statutes. Here, the Ninth Circuit belatedly claims to have discovered that, some thirteen years ago in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986), this Court "essentially overruled" the appellate court's decision in *Carson-Truckee,* 748 F.2d 523 (9th Cir. 1984), which held that a prevailing defendant—and indeed any prevailing party—in an ESA case could recover his attorneys' fees if he had "substantially contributed to the goals of the statute". App. B at 7a-9a.[14]

In reaching its decision in *Carson-Truckee*, the Ninth Circuit relied upon cases from the District of Columbia Circuit endorsing the same rule, i.e. it is appropriate to award attorneys' fees to either a plaintiff or defendant if the party substantially contributed to the goals of the act in question. *See Carson-Truckee,* 748 F.2d at 525. This construction, the Ninth Circuit opined, reflected the apparent congressional intent and is a result approved by this Court in its

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[12] *See, e.g., National Wildlife Federation v. Consumers Power Co.*, 729 F. Supp. 62, 63 (W.D. Mich. 1989).

[13] *See, e.g., Briggs Christian Morris-Smith v. Moulton Niguel Water District*, 44 F. Supp. 2d 1084 (S.D. Cal. 1999); *Atlantic States Legal Foundation, Inc. v. Onodaga Department of Drainage & Sanitation*, 899 F. Supp. 84, 87 (N.D. N.Y. 1995).

[14] As we point out later, this is a misreading of *Delaware Valley*.

decision in *Ruckelshaus*, 463 U.S. 680. In fact, the Ninth Circuit in *Carson-Truckee* construed *Ruckelshaus* as endorsing the evenhanded approach and confining the dual standard to civil rights disputes. *Carson-Truckee,* 748 F.2d at 526.

In arriving at the result here, the Ninth Circuit below acknowledged that it has interpreted the attorneys' fees provisions of the ESA, CWA and other environmental statutes in two different and inconsistent ways with respect to the ability of prevailing defendants to secure reasonable attorneys' fees. App. B at 7a. In *Carson-Truckee*, application of the neutral standard rested upon the determination of whether the prevailing party substantially contributed to the goals of the act without regard to whether the prevailing party was a plaintiff or defendant. In *Razore v. Tulalip Tribes*, 66 F.3d 236 (9th Cir. 1995), the court, without citing its earlier *Carson-Truckee* opinion, held that the fee-shifting provisions of RCRA, 42 U.S.C. section 6972(d), and the CWA, 33 U.S.C. section 1365(d), are to be interpreted under the *Christiansburg* dual standard insofar as prevailing defendants are concerned. *Razore*, 66 F.3d at 240.

In contrast to the Ninth Circuit, the Fifth Circuit has awarded a prevailing defendant attorneys' fees in the successful defense of a suit brought under an environmental statute without finding the plaintiff's case to be "frivolous" and with no suggestion that different standards apply to plaintiffs and defendants. *Sierra Club v. Shell Oil Co.*, 817 F.2d 1169, 1176 (5th Cir. 1987).[15]

Although there is presently no uniform understanding in the lower courts as to the correct rule, the consensus with respect to the award of attorneys' fees in suits filed under the environmental laws seems to follow the Ninth Circuit's holding in the present case. That is: prevailing plaintiffs recover if the result substantially contributes to the purposes of the act—a standard that is rather loosely applied. *See, supra,* nn.12 & 13. Prevailing defendants, on the other hand, recover their attorneys' fees only if the suit is shown to be frivolous or vexatious. The consequence of this very one-sided regime—

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[15] The court below expressed its opinion that there is no contrary reported decision in the courts of appeals, distinguishing *Sierra Club v. Shell Oil Co.*, 817 F.2d 1169, 1176 (5th Cir. 1987), on the ground that it awarded fees to a prevailing defendant "without analysis." App. B at 9a.

affording plaintiffs a risk-free incentive to go to court—is that private environmental litigation (much of which is unsuccessful or only marginally successful) has proliferated, unduly burdening the courts, unfairly weighing on defendants, and inhibiting desirable, amicable solutions. This is not what Congress contemplated.

There is no suggestion in the environmental statutes containing fee-shifting provisions (such as the ESA) that plaintiffs are to be given a preferential status assuring them attorneys' fees with a minimal showing, while defendants are to be saddled with a virtually insurmountable burden. On the contrary, the fee-shifting provisions of virtually all environmental statutes are neutral, awarding fees to "any party" or "the prevailing party" whenever "appropriate." *Ruckelshaus*, 463 U.S. at 681 n.1. This evenhanded wording manifests the fact that Congress' concern was to strike a balance between encouraging citizen enforcement of environmental regulations and avoiding burdening the federal courts with excessive numbers of citizen suits. *See Hallstrom*, 493 U.S. at 28-30.

This Court's intervention is required to give necessary guidance to the lower courts, which (like the Ninth Circuit in this case) evidently believe themselves free to extend the dual standard that applies in the civil rights context to the award of attorneys' fees in environmental cases, absent any indication in the fee-shifting statute that this was the congressional intent.

B. THE QUESTION WHETHER THE "DUAL STANDARD" APPLIES TO THE AWARD OF ATTORNEYS' FEES UNDER THE ENVIRONMENTAL PROTECTION LAWS (AND, SPECIFICALLY, THE ESA) IS OPEN IN THIS COURT

Notwithstanding the decision below, this Court has never determined whether, in cases filed under the environmental protection laws (including the ESA), a prevailing defendant's entitlement to recover attorneys' fees should be governed by a standard different from that applying to a prevailing plaintiff. Indeed, the Court has only decided three cases involving a defendant's claim under fee-shifting statutes. The first, *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), involved a complaint under Title VII of the Civil Rights Act of 1964. The Court there applied a dual standard, which entitled

a prevailing defendant to recover his fees only if "the plaintiff's action was frivolous, unreasonable, or without foundation." *Id.* at 421. The next decision, *Hughes v. Rowe*, 449 U.S. 5 (1980), merely applied the rule of *Christiansburg* to a prevailing defendant's claim under the similarly worded general civil rights fee-shifting statute, 42 U.S.C. section 1988. On the other hand, the third case, *Fogerty*, 510 U.S. 517, firmly rejected the dual standard in the context of a claim for attorneys' fees by a prevailing defendant who had been sued for copyright infringement.[16] This Court has not resolved which rule governs the award of attorneys' fees to a prevailing defendant under the ESA or the other environmental protection laws providing for fee-shifting.

Before *Fogerty*, there may have been grounds for believing that this Court viewed every rule announced to be applicable to *all* fee-shifting statutes, regardless of any differences in wording or differences in the policies underlying the particular law. That impression was created by some dicta in the Court's Opinions in attorneys' fees cases to the effect that the decision would govern claims under other statutes. *See* Justice Thomas' Concurring Opinion in *Fogerty*, 510 U.S. at 537 (collecting these passages). But *Fogerty* put an end to this notion by holding that since the statutory language of the Copyright Act, 17 U.S.C. section 505, providing that the court "in its discretion may . . . award a reasonable attorney's fee to the prevailing party as a part of the costs," gives no indication that successful plaintiffs are to be treated differently from successful defendants, parity of treatment is to be accorded a successful defendant. *Fogerty,* 510 U.S. at 522. *Fogerty* confined the *Christiansburg* rule to civil rights cases due to their unique historical background. *Id.* at 525.

Moreover, when the dicta in this Court's earlier cases (suggesting that the rule in one fee-shifting context should govern others) are examined carefully, it emerges that none of them relates to the question presented here: whether a dual standard as between plaintiff

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[16] To these decisions, one should perhaps add *Flight Attendants v. Zipes*, 491 U.S. 754 (1989), which held that a blameless intervenor cannot be assessed the attorneys' fees incurred by a prevailing plaintiff under Title VII of the Civil Rights Act of 1964, unless his claim was shown to be frivolous.

and defendant ought to prevail outside the civil rights arena. Thus, *City of Burlington v. Dague*, 505 U.S. 557 (1992), merely decided that a contingent-fee arrangement does not justify enhancement of a fee award beyond the "lodestar." Similarly, *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986), invoked by the court below, only determined that attorneys' fees could be allowed for work during the administrative phases of litigation and disallowed a fee enhancement above the lodestar. The holding of *Ruckelshaus*, 463 U.S. 680, is equally limited: it decides only that, even when the fee-shifting statute does not explicitly say so, no one may recover his attorneys' fees unless he prevails to some extent. And, finally, *Hensley v. Eckerhart*, 461 U.S. 424 (1983), is concerned solely with the apportionment or discount of the fee when the claimant has only partially succeeded.[17]

None of these holdings resolves the question whether the dual standard prevailing in civil rights cases obtains elsewhere. If it is true that the dicta in this Court's Opinions is to be construed as declaring the rules discussed to be of general application, then they should govern copyright infringement cases, as well as others in which a fee-shifting statute is involved. Yet, *Fogerty* emphatically holds that the civil rights dual standard is inapplicable in the infringement context. The Court is entirely free to follow the same course here with respect to cases arising under the environmental protection statutes.

C. The Court Should Reject The Dual Standard For the Award of Attorneys' Fees In All Except Civil Rights Cases

All fee-shifting statutes have one thing in common: they permit a deviation from the so-called "American Rule," under which (absent vexatious or bad faith litigation) each side—win or lose—pays its own attorneys' fees. And, presumably, all such provisions reflect a

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[17] We do not include *Northcross v. Board of Education*, 412 U.S. 427 (1973), since that decision applies the civil rights standard announced in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), decided under Title II of the Civil Rights Act of 1964, to the claim of a successful plaintiff under a similarly worded school desegregation statute of 1972 (20 U.S.C. § 1617), without suggesting that a like standard applies beyond the civil rights context.

view that the public interest is served by facilitating *some* lawsuits, and some defenses, which would not otherwise be heard. But, as *Fogerty* instructs, this general community of purpose does not mean that the same standard for the recovery of attorneys' fees applies in all cases, much less that plaintiffs always enjoy a more generous standard than defendants. The question presented here is whether claims for attorneys' fees in ESA cases (and, presumably, cases under the other environmental protection statutes) ought to be governed by the dual standard rule applicable under the civil rights laws or, rather, by the rule of parity that obtains in copyright infringement cases.

The court of appeals justified its overruling of *Carson-Truckee* on the erroneous conclusion that "the attorneys' fee provisions of the ESA and the Civil Rights Act of 1964 ... have a common purpose." App. B at 8a. Nothing in the legislative history of the ESA supports this conclusion. There are sound reasons for treating fee claims under the civil rights acts as a *unique* exception to the *general* principle of parity, which encompasses all other contexts in which deviations from the "American Rule" are authorized. *See Christiansburg,* 434 U.S. at 415-416 and nn.5 & 6. None of these reasons supports the conclusion that a dual standard is to be applied to the fee-shifting provisions of the ESA and similar statutes.

As the Court stressed in *Fogerty,* 510 U.S. at 522, 533, the language of the fee-shifting statutes—referring indifferently to "the prevailing party" or to "any party"—can logically be construed only as requiring parity of treatment as between plaintiff and defendant.[18] Only the strongest evidence that Congress held a contrary intent

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[18] In this respect, we appreciate no difference between the various formulations, the typical "prevailing party" wording of the civil rights provisions (e.g. §§ 204(b) & 706(k) of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-3(b), 2000a-5(k), and 42 U.S.C. § 1988) and of the Copyright Act (17 U.S.C. § 505), the "any party ... whenever ... appropriate" wording of some environmental laws (e.g. ESA § 11(g)(4), 16 U.S.C. § 1540(g)(4); Clean Air Act § 304(g)(2), 42 U.S.C. § 7604(g)(2)), the authorization for the award of attorneys' fees "whenever ... appropriate," without any reference to a "party" (e.g. Clean Air Act § 307(f), 42 U.S.C. § 7609(f)), or the more fulsome wording "any prevailing or substantially prevailing party ... whenever ... appropriate" (e.g. Clean Water Act § 505(d), 42 U.S.C. § 1365(d); Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") § 310(f), 42 U.S.C. § 9659(f)). All are equally neutral as between plaintiff and defendant.

would justify ignoring this apparently "plain meaning." *See Fogerty*, 510 U.S. at 533, 537-538 (Thomas, J., concurring); *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 263-264 (1975).[19] No such evidence exists concerning the fee-shifting provision of the ESA.

The legislative history of the fee-shifting provision of the ESA reveals no congressional intent to favor plaintiffs over defendants.[20] Moreover, this Court has recently had occasion to consider whether the citizen suit provision of the ESA, 16 U.S.C. section 1540(g)(4), is to be construed differently for standing purposes depending upon the motivation of the plaintiff (environmental group or party with an economic interest) in *Bennett v. Spear*, 520 U.S. 137 (1997), and concluded that the ESA affords no basis for differentiation. We submit that likewise it provides no basis for construing the same neutrally-worded statutory provision as manifesting an intent to discriminate between plaintiffs and defendants with respect to fee-shifting.

Parity is supported by elementary notions of fairness. Even the polar extremes with respect to the allocation of attorneys' fees, the "American Rule" and the "British Rule," treat plaintiff and defendant alike. Congress may abandon that principle, but the intention to do so requires a clear showing and is not lightly to be assumed. *Ruckelshaus*, 463 U.S. at 685.

Such indications were found in respect of lawsuits filed under the civil rights statutes. As *Fogerty* points out, however, that is a unique

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[19] This should not be surprising because Congress knows how to provide for a dual standard when it means to do so. In 1976, Congress amended the National Gas Pipeline Safety Act of 1968 to authorize citizen suits and provided:

> In any action under this section, the court may, in the interest of justice, award the costs of suit, including reasonable attorney's fees and reasonable expert witness fees, to a prevailing plaintiff. Such court may, in the interest of justice, award such costs to a prevailing defendant whenever such action is unreasonable, frivolous, or meritless.

§ 17(e) of Pub. L. No. 94-477, 90 Stat. 2073, now codified at 49 U.S.C. § 60121(b).

[20] In addition, in *Fogerty*, this Court noted that Congress, in enacting the fee-shifting provision of the Copyright Act in 1976, could not have been aware of the *Christiansburg* dual standard as that case was not decided until 1978. The same is true of the fee-shifting provision of the ESA, which was signed into law in 1973 and has never been amended.

context. There is, in modern times, no parallel to the national commitment to deal with discrimination. Because discriminatory laws, institutions and habits (whether on the ground of race, national origin or gender) have been entrenched for several centuries, the task was Herculean and Congress called forth all possible means to deal with the problem, including empowering the victims to bring legal actions to vindicate their rights.

In the civil rights context, as opposed to other areas where fee-shifting has been authorized, the adversaries were not seen as equals. The plaintiffs, almost by definition individuals claiming to be the victims of discrimination, were "oftentimes . . . impecunious" and could "ill afford to litigate their claims against defendants with more resources." *Fogerty,* 510 U.S. at 524. Accordingly, "Congress sought to redress this balance in part, and to provide incentives for the bringing of meritorious lawsuits, by treating successful plaintiffs more favorably than successful defendants in terms of the award of attorneys' fees." *Id.*

The unique status of civil rights citizen suits is exemplified by the fact that a successful plaintiff is awarded his fees even if the victory is only technical. *Newman v. Piggie Park Enterprice,, Inc.*, 390 U.S. 400 (1968); *Christiansburg,* 434 U.S. at 416. By way of contrast, the Court in *Ruckelshaus*, 463 U.S. at 687 n.9, pointed out that trivial success on the merits is not sufficient to entitle a plaintiff to attorneys' fees under the fee-shifting provisions of environmental statutes.

Lawsuits filed under the ESA (and the other environmental protection statutes) involve no exceptional circumstance comparable to the civil rights cases. While it is true that in 1972 Congress adopted a policy of protecting endangered species (as it also enacted laws to combat air, water and land pollution), this was not remotely on the same scale as the "war against discrimination" that began in earnest in the previous decade. And, equally important, in the environmental field, governmental agencies, federal and state, were assigned the leading enforcement role. While citizen suits were authorized, private plaintiffs are not, as in the civil rights field, the primary "chosen instrument of Congress" to vindicate the law. *See Christiansburg,* 434

U.S. at 418.[21] In the environmental context, citizen plaintiffs "support," not "supplant" the governmental agencies specifically charged with enforcement responsibilities. *Hallstrom*, 493 U.S. at 29; *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 60 (1987). In these circumstances, there is no reason to create an unequal incentive for citizen plaintiffs.

Nor did Congress, in adopting fee-shifting provisions in environmental laws, manifest an intent to favor plaintiffs over defendants. On the contrary, as this Court observed in *Hallstrom*:

> [T]he legislative history indicates an intent to strike a balance between encouraging citizen enforcement of environmental regulations and avoiding burdening the federal courts with excessive numbers of citizen suits.

493 U.S. at 29. In *Fogerty*, the Court said "the policies served by the Copyright Act are more complex, more measured, than simply maximizing the number of meritorious suits." *Fogerty*, 510 U.S. at 526. The same may be said of the ESA. Indeed, the Court recently recognized this in *Bennett v. Spear*, observing that in addition to species conservation, "economic consequences are an explicit concern of the Act." *Bennett*, 520 U.S. at 177.

To say that the "goals and objectives" of the Civil Rights Act and the ESA are "not completely similar," as this Court said of the Civil Rights Act and the Copyright Act in *Fogerty*, 510 U.S. at 524, is a gross understatement. Plaintiffs under the ESA are typically not "impecunious" as in the case of the victims of discrimination. For the most part, as is the case here, private ESA lawsuits are brought by environmental organizations,[22] many of which are well-financed.[23]

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[21] We note that *Christiansburg* also justified the dual standard there announced on the ground that a prevailing plaintiff was seeking an award of attorneys' fees "against a violator of federal law." 434 U.S. at 418. Significantly, this rationale is not repeated in *Fogerty*. Nor could it be, since a copyright infringer is equally "a violator of federal law," yet, under the parity rule of *Fogerty*, the plaintiff enjoys no advantage on that ground in the allocation of attorneys' fees.

[22] It is worth noting that private property owners and local irrigation districts may also be plaintiffs under the ESA. *Bennett v. Spear*, 520 U.S. 154 (1997). Presumably, if they prevail, they are equally eligible for an award of attorneys' fees.

[23] The following data on environmental organizations' members, budgets and staffs as of 1990 are instructive:

They are "highly organized, professional advocacy and litigation groups" which together constitute no less than an "environmentalist enforcement cartel." Michael S. Greve, *The Private Enforcement of Environmental Law,* 65 Tul. L. Rev. 339, 342, 370 (1990).

On the other hand, defendants include very small landowners and businesses who can ill afford to pay their own lawyers, much less their opponent's attorneys' fees. Here, as in the copyright infringement context, the balance is much more even and no artificial advantage need be given to the plaintiff.

Furthermore, just as "a successful defense of a copyright infringement action may further the policies of the Copyright Act every bit as much as a successful prosecution of an infringement claim," *Fogerty,* 510 U.S. at 527, so may a successful defense of an ESA citizen suit further the policies of that statute. Indeed, the Ninth Circuit found that is exactly what happened in this case. The court observed that if plaintiffs' interpretation of the ESA were adopted, "desirable communication between private entitities and federal agencies on how to comply with the ESA would be stifled and protection of threatened and endangered species would suffer." *Marbled Murrelet I,* App. G at 83a. This result demonstrates that when a plaintiff can initiate a suit under the ESA or a similarly

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Organization	Founded	Members	Budget (in millions)	Staff
National Wildlife Federation*	1936	5,600,000	$85.0	700
National Resource Defense Council**	1970	125,000	$13.0	125
Sierra Club	1892	553,246	$28.0	185
The Wilderness Society	1935	330,000	$20.0	130
National Audubon Society	1905	516,220	$32.9	337
Defenders of Wildlife	1947	80,000	$ 4.5	30
Environmental Defense Fund	1967	125,000	$12.9	100
Friends of the Earth	1969	50,000	$2.5	35
Greenpeace	1971	1,400,000	$33.9	1200

* Membership figure includes members and supporters.

** Staff includes 40 lawyers.

George Hager, "Lobbyists: For Industry and Opponents, A Showdown Is In the Air," 48 Cong. Q. Wkly. Rep. 145, 146 (1990).

worded environmental statute containing a citizen suit provision (as opposed to a rule-making challenge that can only be brought in the court of appeals where a governmental agency is always the defendant),[24] there is every reason to encourage appeals by defendants, as well as plaintiffs, to interpret the law.

In sum, environmental lawsuits present no exceptional circumstances justifying a dual standard with respect to the award of attorneys' fees.

As the Court concluded in *Fogerty*, rejecting the dual standard does not mean embracing the "British Rule," under which the loser automatically is assessed the winner's attorneys' fees. *Fogerty,* 510 U.S. at 533-534. The district court must exercise its discretion. The one clear rule is that "[p]revailing plaintiffs and prevailing defendants are to be treated alike." *Id.* at 534. We suggest a standard that would allow the successful defendant to recover his attorneys' fees—absent special circumstances—if the outcome is in the prevailing defendant's favor and furthers the purposes of the act involved.[25] In the present case, there can be no doubt that the defendant met this test.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be granted.

Respectfully submitted,

EDGAR B. WASHBURN
Counsel of Record
WASHBURN, BRISCOE & MCCARTHY
Attorneys for Petitioners

September 30, 1999

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[24] *Ruckelshaus*, 463 U.S. 680, was such a case. In that context, there is obviously no point in considering the attorneys' fee claim of a successful defendant agency. Since the case is brought in the court of appeals in the first instance, an appellate decision considering the various points of law is almost a certainty. The same is not true where an action is brought in the district court. There, both sides should be equally encouraged to pursue appeals that further the purpose of the act involved.

[25] Of course, an award must go to the prevailing party if his opponent has put forward a frivolous complaint or defense.

APPENDIX A

NOT FOR PUBLICATION

MARBLED MURRELET *(Brachyramphus marmoratus)*;
NORTHERN SPOTTED OWL *(Strix occidentalis caurina)*;
ENVIRONMENTAL PROTECTION INFORMATION CENTER, INC.,
Plaintiffs-Appellees,
v.
BRUCE BABBITT, Secretary, Department of the Interior; MOLLIE BEATTIE, Director, United States Fish and Wildlife Service; MICHAEL SPEAR, Region 1 Director, United States Fish and Wildlife Service; U.S. FISH AND WILDLIFE SERVICE,
Defendants,
and
PACIFIC LUMBER COMPANY, a Delaware corporation; SCOTIA PACIFIC HOLDING COMPANY, a Delaware corporation; SALMON CREEK CORPORATION, a Delaware corporation,
Defendants-Appellants.

No. 98-15788

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

August 25, 1999, Filed

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of California. D.C. No. CV-95-03261-LCB. Louis Charles Bechtle, Chief District Judge, Presiding.

DISPOSITION: Petition for rehearing and rehearing *en banc* DENIED.

JUDGES: Before: Mary M. Schroeder, Stephen Reinhardt, and Barry G. Silverman, Circuit Judges.

The panel, as constituted above has voted to deny the petition for rehearing and the petition for rehearing *en banc*.

The full court has been advised of the petition for *rehearing en banc* and no active judge has requested a vote on whether to rehear the matter *en banc*. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing *en banc* are denied.

APPENDIX B

MARBLED MURRELET *(Brachyramphus marmoratus)*;
NORTHERN SPOTTED OWL *(Strix occidentalis caurina)*;
ENVIRONMENTAL PROTECTION INFORMATION CENTER, INC.,
Plaintiffs-Appellees,
v.
BRUCE BABBITT, Secretary, Department of the Interior; MOLLIE BEATTIE, Director, United States Fish and Wildlife Service; MICHAEL SPEAR, Region 1 Director, United States Fish and Wildlife Service; U.S. FISH AND WILDLIFE SERVICE,
Defendants,
and
PACIFIC LUMBER COMPANY, a Delaware corporation; SCOTIA PACIFIC HOLDING COMPANY, a Delaware corporation; SALMON CREEK CORPORATION, a Delaware corporation,
Defendants-Appellants.

No. 98-15788

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

182 F.3d 1091; 1999 U.S. App. LEXIS 14999; 48 ERC (BNA) 1983; 99 Cal. Daily Op. Service 5408; 99 Daily Journal DAR 6899

April 14, 1999, Argued and Submitted, San Francisco,

July 7, 1999, Filed

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of California. D.C. No. CV-95-03261-LCB. Louis Charles Bechtle, Chief District Judge, Presiding.

DISPOSITION: AFFIRMED.

COUNSEL: Jared G. Carter, Rawles, Hinkle, Carter, Behnke & Oglesby, Ukiah, California, for the defendants-appellants.

Thomas N. Lippe, Law Offices of Thomas N. Lippe, San Francisco, California, for the plaintiffs-appellees.

James M. Heckler, Trial Lawyers for Public Justice, Washington, D.C., for the amicus.

Robin L. Rivett, Pacific Legal Foundation, Sacramento, California, for the amicus.

JUDGES: Before: Mary M. Schroeder, Stephen Reinhardt, and Barry G. Silverman, Circuit Judges.

OPINION BY: Mary M. Schroeder

This is an appeal from the denial of attorney's fees to the defendant in a lawsuit under the Endangered Species Act. A non-profit environmental group filed the suit and the defendant logging company prevailed. The district court considered the defendant's claim for fees under two different standards that this court has used in the past to determine whether to award fees to a prevailing defendant in environmental cases. The district court ruled that the defendant in this case was not entitled to fees under either standard. We affirm the denial and take this opportunity to clarify the law in this area in light of intervening Supreme Court authority.

I. BACKGROUND

This case arose out of a dispute over defendant-appellant Pacific Lumber's plan to log old-growth redwoods in the Headwaters Forest in Humboldt County, California. The forest, owned by Pacific Lumber, is home to the marbled murrelet and the northern spotted owl, birds protected by the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-43. To conduct the logging in compliance with California law, Pacific Lumber needed a timber harvest plan approved by the California Department of Forestry ("CDF"). *See* Cal. Pub. Res. Code §§ 4581-82. Pursuant to California forestry regulations, *see* Cal. Code Regs. tit. 14,

§ 919.5, the CDF approved the plan by soliciting concurrence letters from the U.S. Fish and Wildlife Service ("FWS") stating that the proposed logging would be unlikely to harm endangered species. Pacific Lumber also consulted directly with the FWS to determine what it would have to do to avoid a "take" of endangered species prohibited by § 9 of the ESA. *See* 16 U.S.C. §§ 1532 & 1538.

In September 1995, plaintiff-appellee the Environmental Protection Information Center ("EPIC") sued Pacific Lumber, the FWS, and several other defendants, alleging that they were violating §§ 7 and 9 of the ESA. In its § 7 claim, EPIC argued that the FWS' consultation letters approving Pacific Lumber's timber harvest plan and its advice to Pacific Lumber constituted "agency actions" that required the FWS to prepare a biological assessment and a biological opinion detailing the impact the action could have on endangered and threatened species. *See* 16 U.S.C. § 1536(a). The § 7 claim also listed Pacific Lumber as a defendant on the theory that by cooperating with the FWS, Pacific Lumber had "assumed responsibility for compliance with federal laws governing the actions" of the FWS. In its claim under § 9 of the ESA, EPIC argued that Pacific Lumber's logging would constitute a prohibited "take" of marbled murrelets.

The district court initially entered a preliminary injunction on EPIC's § 7 claim. This court reversed the injunction in June 1996, holding plaintiffs had not raised any serious question. *See Marbled Murrelet v. Babbitt*, 83 F.3d 1068 (9th Cir. 1996). EPIC amended its complaint to add a second § 7 claim. The district court again entered a preliminary injunction, and this court again reversed and vacated the injunction on similar grounds. *See Marbled Murrelet v. Babbitt,* 111 F.3d 1447 (9th Cir. 1997). On remand, the district court granted summary judgment to Pacific Lumber on the § 7 claims. EPIC voluntarily dismissed its § 9 claim.

Pacific Lumber then moved for approximately $670,000 in attorney's fees and costs under § 11 of the ESA, which allows the district court to award fees to "any party" where "appropriate." 16 U.S.C. § 1540(g)(4). The district court denied Pacific Lumber's motion on the alternative grounds that Pacific Lumber could meet neither the standard of *Carson-Truckee Water Conservancy Dist. v. Secretary of the Interior,* 748 F.2d 523 (9th Cir. 1984), which allows prevailing defendants attorney's fees whenever the defendants' actions "substantially contributed" to the goals of the ESA, nor the standard of

Razore v. Tulalip Tribes of Washington, 66 F.3d 236 (9th Cir. 1995), which allows prevailing defendants attorney's fees under the Clean Water Act ("CWA") and the Resource Conservation and Recovery Act ("RCRA") if the plaintiffs' lawsuit was "frivolous, unreasonable or without foundation." Pacific Lumber appeals.

II. DISCUSSION

A. THE APPROPRIATE STANDARD FOR AWARDING DEFENDANT FEES

Section 11(g)(4) of the Endangered Species Act provides that a district court "may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate." 16 U.S.C. § 1540(g)(4). Many other environmental statutes likewise permit fees "where appropriate."[1] n1 This circuit has interpreted the ESA, the CWA, and these other environmental statutes in two different ways.

In *Carson-Truckee*, a Nevada water district sued the Department of the Interior under several reclamation statutes to force the sale of water from a reservoir. The Pyramid Lake Paiute Tribe intervened as a defendant and asserted, among other things, that the government's obligations under the ESA to leave water for endangered fish trumped its obligation under the reclamation laws to sell water for municipal and industrial use. *See Carson-Truckee Water Conservancy Dist. v. Watt*, 575 F. Supp. 467, 468 (Dist. Nev. 1983), *aff'd*, 748 F.2d 523 (9th Cir. 1984). The district court agreed with the Tribe and dismissed the suit. It refused, however, to grant the Tribe attorney's fees on the ground that the Tribe had not substantially contributed to the goals of the Act. *See 575 F. Supp. at 469.*

This court affirmed. We rejected the Tribe's suggestion that the district court should have applied *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421, 54 L. Ed. 2d 648, 98 S. Ct. 694 (1978), which allows attorney's fees to a prevailing defendant under the Civil Rights Act of 1964 if the plaintiff's action was frivolous. We

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[1] *See, e.g.*, Clean Air Act, 42 U.S.C. § 7607(f); Toxic Substances Control Act, 15 U.S.C. § 2618(d); Surface Mining Control and Reclamation Act, 30 U.S.C. (Supp. IV) § 1270(d); and other environmental statutes listed in *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 682 n.1, 77 L. Ed. 2d 938, 103 S. Ct. 3274 (1983).

distinguished the Civil Rights Act on the ground that it contains an attorney's fees provision that allows attorney's fees to "prevailing parties," *see* 42 U.S.C. § 2000e-5(k), whereas the ESA allows fees "where appropriate." *Carson-Truckee,* 748 F.2d at 526 (quoting *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402, 19 L. Ed. 2d 1263, 88 S. Ct. 964 (1968)). Instead, citing D.C. Circuit case law, we held in *Carson-Truckee* that an award of attorney's fees is appropriate only if the party has substantially contributed to the goals of the statute. *See Carson-Truckee*, 748 F.2d at 525-26 (citing *Sierra Club v. Gorsuch,* 217 U.S. App. D.C. 180, 672 F.2d 33 (D.C. Cir. 1982), *rev'd sub nom. Ruckelshaus v. Sierra Club,* 463 U.S. 680, 77 L. Ed. 2d 938, 103 S. Ct. 3274 (1983)). In deciding the extent of a party's contribution, we said that "the dominant consideration is whether litigation by the party has served the public interest by assisting the interpretation or implementation" of the ESA. 748 F.2d at 525 (quoting *Alabama Power Co. v. Gorsuch*, 217 U.S. App. D.C. 148, 672 F.2d 1, 3 (D.C. Cir. 1982)). We concluded that because the Tribe had merely duplicated the efforts of the United States and had asserted other defenses inconsistent with the implementation of the ESA, it had not substantially contributed to the goals of the ESA.

Eleven years later, in *Razore v. Tulalip Tribes of Washington,* 66 F.3d 236 (9th Cir. 1995), we adopted a different standard for attorney's fees under RCRA and the CWA. The owner of a landfill on a reservation had sued the Tulalip Tribes under RCRA and the CWA for the Tribes' counter-productive attempt to stop polluted runoff from the landfill. The district court dismissed the owner's suit on the merits, but refused to grant the defendant Tribes attorney's fees. We adopted for RCRA and the CWA the *Christiansburg* civil rights standard of frivolousness that we had rejected for the ESA in *Carson-Truckee. See Razore,* 66 F.3d at 240 (quoting *Christiansburg,* 434 U.S. 412 at 421). We found the plaintiff's action against the Tribes not to have been frivolous, and affirmed the denial of attorney's fees.

We will follow *Razore*, not *Carson-Truckee*, and now hold that the Christianburg standard for prevailing defendants applies in this case. *Carson-Truckee*'s holding that the "substantial contribution" standard applies to prevailing defendants in ESA suits is no longer good law. Two years after *Carson-Truckee*, the Supreme Court indicated that attorney's fees provisions in environmental statutes with similar language and purpose as the attorney's fees provision in the Civil Rights

Acts should be interpreted in the same way. *See Pennsylvania v. Delaware Valley Citizens' Council,* 478 U.S. 546, 92 L. Ed. 2d 439, 106 S. Ct. 3088 (1986). In *Delaware Valley*, the Court addressed whether a prevailing plaintiff in a Clean Air Act ("CAA") case can receive attorney's fees for participating in administrative proceedings. The Court compared § 304(d) of the CAA, 42 U.S.C. § 7604(d), which authorizes fees in "any action" under the Act, with the civil rights attorney's fees provision, 42 U.S.C. § 1988, which authorizes fees for "any action or proceeding" and which had been interpreted to allow fees for administrative proceedings. The Court pointed out that even though the two sections are worded slightly differently, their purposes "are nearly identical." *Delaware Valley* at 559. Specifically, § 1988 "was enacted to insure that private citizens have a meaningful opportunity to vindicate their rights protected by the Civil Rights Acts," *id at 559,* and § 304(d) was meant to encourage "citizen participation in the enforcement of standards and regulations established under [the CAA]," *id.* at 560 (quoting S. Rep. No. 91-1196, p. 36 (1970)). The Court concluded that "given the common purpose of both § 304(d) and § 1988 to promote citizen enforcement of important federal policies, we find no reason not to interpret both provisions governing attorney's fees in the same manner."

Delaware Valley has thus essentially overruled the reasoning of our decision in *Carson-Truckee*. Like § 304(d) of the CAA, § 11(g)(4) of the ESA is very similar to the civil rights attorney's fees provision. The ESA attorney's fees provision allows the award of attorney's fees "to any party, whenever the court determines such award is appropriate." Section 1988 states that a court "in its discretion, may allow the prevailing party . . . a reasonable attorney's fee." The most obvious difference between the two is that § 1988 specifies that the party must be prevailing whereas the ESA does not, but the difference is immaterial, because the Supreme Court has read a prevailing party requirement into the ESA. *See Ruckelshaus v. Sierra Club,* 463 U.S. 680, 682 & n.1, 77 L. Ed. 2d 938, 103 S. Ct. 3274 (1983).

The attorney's fees provisions of the ESA and the Civil Rights Act of 1964 likewise have a common purpose.[2] The *Christiansburg* Court

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[2] Although *Delaware Valley* involved the attorney's fees provision in 42 U.S.C. § 1988 and *Christiansburg* addressed the attorney's fees provision in Title VII, 42

adopted the frivolity standard for prevailing defendants because the legislative history of the Civil Rights Act indicated Congress' desire to prevent "frivolous" or "unjustified" suits. *Christiansburg,* 434 U.S. at 420. The legislative history of the ESA suggests a similar desire on the part of Congress. The House Report on the ESA stated that the attorney's fees provision of the ESA should be interpreted in the same fashion as the identical provision in the Marine Protection, Research, and Sanctuaries Act ("MPRSA"). *See* H. Rep. No. 412, 93d Cong., 1st Sess. 19 (1973). The Senate Committee Report on the MPRSA stated that prevailing defendants could receive fees only if the purpose of the suit was harassment. *See* 1972 U.S. Code Cong. & Admin. News 4234, 4249-50. Given the similarity in language and purpose between the attorney's fees provisions of the Civil Rights Act and the ESA, *Delaware Valley* mandates that we apply to the ESA the civil rights standard for awarding fees to prevailing defendants. We can find no contrary authority in any other circuits. The only circuit case since *Delaware Valley* to award fees to a prevailing defendant in an environmental case did so without any analysis of what standard should be applied. *See Sierra Club v. Shell Oil,* 817 F.2d 1169, 1176 (5th Cir. 1987).

B. APPLICATION OF THE *CHRISTIANSBURG* STANDARD IN THIS CASE

Of the two claims in EPIC's complaint, one, the § 7 claim, is not at issue under the *Christiansburg* standard, for Pacific Lumber does not contend that EPIC's § 7 claim was frivolous. The district court did not abuse its discretion in determining that the § 9 claim was not frivolous when filed, even though it was brought with limited evidentiary support, because most of the possible evidence was located on Pacific Lumber's private land and because EPIC's decision to sue was based on an expert's opinion about the potential effects of logging.

Under the *Christiansburg* standard, a prevailing defendant may also be entitled to fees if the plaintiff continued to litigate the suit after it clearly became frivolous. *See* 434 U.S. at 422. Pacific Lumber initially contends that the district court failed to apply this second part

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U.S.C. § 2000e-5(k), the two provisions are interpreted to be the same. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7, 76 L. Ed. 2d 40, 103 S. Ct. 1933 (1983).

of the *Christiansburg* frivolity test, but the district court was aware of both aspects of the test. It set forth Pacific Lumber's position to be both that "EPIC brought the Section 9 claim without supporting evidence" and that "it continued to litigate the claim without such evidence." The district court's ruling in favor of EPIC on this issue was not an abuse of discretion. Although EPIC voluntarily dismissed its § 9 claim, a case is not automatically meritless merely because the plaintiff eventually lost its case. *See id. at 421.* There is evidence in the record to support the district court's conclusion that EPIC's litigation may have contributed to Pacific Lumber's decision to abandon helicopter logging. Pacific Lumber does not point to any evidence developed during the course of litigation that should have put EPIC on notice that its suit was frivolous. We therefore affirm the district court's application of the *Christiansburg* standard.

AFFIRMED.

APPENDIX C

MARBLED MURRELET *(Brachyramphus marmoratus)*, NORTHERN SPOTTED OWL *(Strix occidentalis caurina)* and ENVIRONMENTAL PROTECTION INFORMATION CENTER, INC.

v.

BRUCE BABBITT, MOLLIE BEATTIE, MICHAEL SPEAR, U.S. FISH & WILDLIFE SERVICE, THE PACIFIC LUMBER COMPANY, SCOTIA PACIFIC HOLDING COMPANY and SALMON CREEK CORPORATION

No. C 95-3261 LCB

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

1998 U.S. Dist. LEXIS 4266

March 31, 1998, Filed

DISPOSITION: Defendants Pacific Lumber Company, Scotia Pacific Holding Company and Salmon Creek Corporation's petition for attorneys' fees DENIED.

COUNSEL: For MARBLED MURRELET *(Brachyramphus marmoratus)*, NORTHERN SPOTTED OWL *(Strix occidentalis caurina)*, ENVIRONMENTAL PROTECTION INFORMATION CENTER, Plaintiffs: Sharon E. Duggan, Law Offices of Sharon E. Duggan, San Francisco, CA.

For MARBLED MURRELET *(Brachyramphus marmoratus)*, NORTHERN SPOTTED OWL *(Strix occidentalis caurina)*, ENVIRONMENTAL PROTECTION INFORMATION CENTER, Plaintiffs: Thomas N. Lippe, Law Offices of Thomas N. Lippe, San Francisco, CA.

For BRUCE BABBITT, MOLLIE BEATTIE, MICHAEL SPEAR, *defendants:* Patrick R. Bupara, AUSA, Michael J. Yamaguchi, USAtty, U.S. Attorney's Office, San Francisco, CA.

For BRUCE BABBITT, MOLLIE BEATTIE, MICHAEL SPEAR, defendants: James C. Kilbourne, Christiana P. Perry, Ellen J. Kohler, Lois R. Schiffer, U.S. Department of Justice, Washington, DC.

For UNITED STATES FISH AND WILDLIFE SERVICE, defendant: Patrick Ramirez, U.S. Attorney's Office, San Francisco, CA.

For UNITED STATES FISH AND WILDLIFE SERVICE, defendant: Ellen J. Kohler, U.S. Department of Justice, Washington, DC.

For PACIFIC LUMBER COMPANY, SCOTIA PACIFIC HOLDING COMPANY, SALMON CREEK CORP, defendants: Alson R. Kemp, Andrea Gross, David W. Trotter, Pillsbury Madison & Sutro LLP, San Francisco, CA.

For PACIFIC LUMBER COMPANY, SCOTIA PACIFIC HOLDING COMPANY, SALMON CREEK CORP, defendants: Jared G. Carter, Frank Shaw Bacik, Rawles Hinkle Carter Benke & Oglesby, Ukiah, CA.

JUDGES: Louis C. Bechtle, J.

OPINION BY: Louis C. Bechtle

Presently before the court is defendants Pacific Lumber Company, Scotia Pacific Holding Company and Salmon Creek Corporation's (collectively "PL") motion for attorneys' fees and plaintiffs Marbled Murrelet, Northern Spotted Owl and Environmental Protection Information Center, Inc.'s (collectively "EPIC") opposition thereto. For the reasons set forth below, the motion will be denied.

I. BACKGROUND

EPIC brought this civil action to enjoin PL's logging activities on privately owned timberland in Humboldt County, California. A detailed background of the case is set forth in the court's Order granting PL's summary judgment motion. *See Marbled Murrelet v. Babbitt,* 1997 U.S. Dist. LEXIS 9138, No. C95-3261, 1997 WL 361232, *1-5 (N.D.

Cal. June 24, 1997). The key facts relevant to this motion for fees follow.

EPIC is a non-profit organization engaged in environmental causes including the protection of endangered species. PL is engaged in the commercial harvesting of timber in Northern California. EPIC asserted that the property on which PL was harvesting timber was inhabited by two species of birds, the Marbled Murrelet and the Northern Spotted Owl, both of which are subject to the protections of the Endangered Species Act, 16 U.S.C. § 1531, et seq. ("ESA"). The Marbled Murrelet is listed as "threatened" and the Northern Spotted Owl is listed as "endangered" under the ESA.

EPIC brought two claims against the defendants. One claim alleged that PL's harvesting activities would effect a "take" of the Marbled Murrelet in violation of Section 9 of the ESA, 16 U.S.C. § 1538. On January 13, 1997, the court granted Plaintiffs' motion to dismiss their Section 9 claim with prejudice.

The other claim was brought pursuant to Section 7 of the ESA, 16 U.S.C. § 1536, and Section 102(2)(C) of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332(2)(C).[1] In that claim, EPIC alleged that the United States Fish and Wildlife Service ("FWS") had, in two instances, engaged in "agency action" under Section 7 of the ESA and engaged in "major federal action" under NEPA in evaluating and approving PL's timber harvesting plans. Agency action occurs when the agency engages in an action in which it has discretionary involvement or control. 50 C.F.R. § 402.03. Federal regulations define "action" as including "(a) actions intended to conserve listed species or their habitat; (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air." 50 C.F.R. § 402.02. Section 7 of the ESA requires that when federal agencies, including the FWS, take "agency action" they must:

> insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency

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[1] Plaintiffs filed their ESA claims under the citizen-suit provision of that statute. 16 U.S.C. § 1540(g)(1)(A). Because NEPA does not contain a private right of action, the court interpreted Plaintiffs' NEPA claim as a claim under the Administrative Procedure Act ("APA") because it sought review of a final agency decision. 5 U.S.C. § 704.

> action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical . . . .

16 U.S.C. § 1536(a)(2). This process is known as "internal consultation" and is accomplished by formally or informally "consulting" before engaging in an action that may affect a protected species. *See* 50 C.F.R. § 402.14(a). If the action may adversely affect an endangered or threatened species or its critical habitat, the agency must initiate formal consultation and the FWS must prepare a biological opinion. 50 C.F.R. § 402.14(h)(3).

EPIC claimed that the FWS had engaged in agency action in reviewing two separate harvesting plans. The first instance was for PL's plan to harvest dead, dying or diseased trees on PL's property. Under California statute, those persons planning to conduct harvest activities on healthy trees must file a Timber Harvest Plan ("THP") with the California Department of Forestry and Fire Protection ("CDF"). Cal. Pub. Res. Code § 4581. However, persons planning to conduct the harvest of dead, dying or diseased trees may file a less detailed "exemption notice" with the CDF. Cal. Pub. Res. Code § 4584; 14 Cal. Code Reg. § 1038. Although the statutes do not require the CDF to coordinate its efforts with the FWS in the review of THPs or exemption notices, the CDF consulted with the FWS in evaluating whether the exemption harvesting would result in a take of endangered species. The FWS also corresponded with PL as to whether harvesting activities would constitute a take of an endangered species for the planned exemption harvesting and the conditions to avoid such a take. On September 1, 1995, PL notified the FWS and the state agencies involved that it would comply with the FWS's conditions.

On September 15, 1995, the first day of the planned harvest, EPIC filed their Complaint and a Motion for a Temporary Restraining Order to enjoin the exemption harvests. EPIC claimed the FWS had engaged in agency action under 16 U.S.C. § 1536(a)(2), and had failed to perform an internal consultation as to the exemption harvests. The court granted that motion. On September 29, 1995, the court granted EPIC's

motion for a Preliminary Injunction.[2] PL appealed, arguing that the consultation between itself, the CDF and the FWS did not rise to the level of "agency action" and so an internal consultation was unnecessary. On May 7, 1996, the United States Court of Appeals for the Ninth Circuit vacated the injunction holding that the communication with the FWS "does not constitute discretionary involvement or control over the Lumber Companies' proposed tree harvest operations." *Marbled Murrelet v. Babbitt,* 83 F.3d 1068, 1075 (9th Cir. 1996) *("Marbled Murrelet I").*

EPIC also claimed that the FWS had engaged in agency action in reviewing another harvest planned by PL. In addition to the exemption harvest, PL also planned to conduct harvests of healthy trees on its property. As stated above, PL was required to file THPs regarding those harvests with the CDF. Because the land on which PL wished to conduct harvest activities was in the range of the Northern Spotted Owl, the PL was required to include special information in its THPs regarding the impact of such activities on the Northern Spotted Owl. 14 Cal. Code Reg. § 919.9. The statute provided seven alternative methods of providing this information. *Id.* The method chosen by PL was under § 919.9(e), which required the PL to obtain "written documentation [by a Professional Forester] . . . that the described or proposed management prescription is acceptable to the USFWS." *Id.* PL prepared a Spotted Owl Management Plan that outlined the method whereby PL would perform the harvest without effecting a take of the owl under the ESA. On November 20, 1992, the FWS sent PL a letter of "Concurrence with Spotted Owl Management Plan," which states that the FWS has reviewed the Owl Management Plan and "concurs that activities conducted on [PL] property in compliance with this Plan likely will not result in a take of Northern Spotted Owls, provided that such activities also comply with conditions specified in this response."[3] The FWS's letter of concurrence satisfied the requirements of § 919.9(e). Relying on FWS's concurrence as satisfying the requirements of 14 Cal. Code

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[2] Those proceedings were presided over by the Honorable Maxine M. Chesney.

[3] PL subsequently revised the Management Plan. Upon receiving the second plan, the FWS sent a second letter concurring with the modified plan, stating that "the [FWS] concurs that activities conducted on [PL] property in accordance with this plan are not likely to result in take of northern spotted owls."

Reg. § 919.9, PL submitted eight THPs regarding harvest operations within the Northern Spotted Owl's habitation range.

On March 7, 1996, EPIC filed an expedited motion for a temporary restraining order and a preliminary injunction, seeking to enjoin the timber harvests under the THPs. EPIC argued that the FWS had engaged in agency action under 16 U.S.C. § 1536(a)(2) by providing the letter of concurrence to PL and that the FWS had failed to perform an internal consultation or biological opinion. On March 15, 1996, the court granted the temporary restraining order. On April 3, 1996, the court entered the preliminary injunction with regard to any timber harvest conducted pursuant to a THP that was obtained on reliance of the FWS's letter of concurrence. PL appealed that ruling. PL subsequently modified six of the eight THPs so that they would comply with 14 Cal. Code Reg. § 919.9 under alternatives other than § 919.9(e) and the court lifted the injunction as to those THPs. On April 18, 1997, the Ninth Circuit vacated the preliminary injunction as to the two remaining THPs. *Marbled Murrelet v. Babbitt*, 111 F.3d 1447 (9th Cir. 1997) *("Marbled Murrelet II")*. In that ruling, the Ninth Circuit found that the FWS's letters of concurrence did not constitute agency action under 16 U.S.C. § 1536(a)(2) because the FWS lacked the discretion to influence private action. *Id.* at 1449-50.

On June 18, 1997, the court entered summary judgment in favor of PL on the Section 7 claims. *Marbled Murrelet v. Babbitt*, 1997 U.S. Dist. LEXIS 9138, No. C95-3261, 1997 WL 361232, *7-8 (N.D. Cal. June 24, 1997). The court found that under the Ninth Circuit's rulings in *Marbled Murrelet I* and *Marbled Murrelet II*, EPIC could not sustain its cause of action under Section 7 as to either the exemption harvests or the THP harvests. *Id.* at *6. The court noted that "in both rulings, the [Ninth Circuit] held that the [FWS] did not engage in 'agency action' under the ESA because there was no 'discretionary Federal involvement or control' over PL's logging activities." *Id.* The court also noted that EPIC would be unable to sustain their action under the more stringent NEPA definition of major federal action. *Id.* Subsequent to the entry of summary judgment in its favor, PL filed this motion for attorneys' fees.

II. DISCUSSION

PL filed a petition requesting that the court grant attorneys' fees and costs. PL claims it is entitled to statutory attorneys' fees under the ESA

fee shifting provision, 16 U.S.C. 1540(g)(4). PL also claims it is entitled to attorneys' fees under the traditional "bad faith" standard and the "frivolous, unreasonable, or without foundation" standard of *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421, 54 L. Ed. 2d 648, 98 S. Ct. 694 (1978). The court will first address which standard to apply to the request for attorneys' fees. Then, the court will address the claim for fees under both the ESA fee shifting provision and the traditional and *Christiansburg* standards. Finally, the court will address the issue of costs.

A. APPLICABLE STANDARD FOR ATTORNEYS' FEES

Under the traditional "American Rule," a prevailing party is not ordinarily entitled to receive attorneys' fees. *See Ruckelshaus v. Sierra Club,* 463 U.S. 680, 683-684, 77 L. Ed. 2d 938, 103 S. Ct. 3274 (1983) (citing *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,* 421 U.S. 240, 44 L. Ed. 2d 141, 95 S. Ct. 1612 (1975)). One exception to the American Rule is the court's inherent power to assess attorneys' fees when a party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Alyeska,* 421 U.S. at 258-259 (internal quotations omitted); *see also Chambers v. NASCO, Inc.*, 501 U.S. 32, 45, 115 L. Ed. 2d 27, 111 S. Ct. 2123 (1991) (quoting *Alyeska*). In addition to this punitive award, many of the environmental statutes, including the ESA, have fee shifting provisions which enable a litigant who has achieved at least some success on the merits to receive attorneys' fees. *Ruckleshaus v. Sierra Club,* 463 U.S. at 682 n.1, 684.[4] Under the ESA:

> the court, in issuing any final order in any suit brought pursuant to paragraph (1) of this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

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[4] Although the Ruckleshaus court addressed the Clean Air Act ("CAA"), the Court noted that the fee shifting provision of the CAA is similar to the provisions located in several other environmental statutes, including the ESA. *See id.* at 682 n.1. When interpreting the fee provision under the ESA, courts have looked to cases regarding these other statutes, including the Clean Air Act, 42 U.S.C. § 7607(f) and the Clean Water Act, 33 U.S.C. § 1365(d). *Id.* ("the interpretation of 'appropriate' in § 307(f) [of the Clean Air Act] controls construction of the term in [other environmental] statutes").

16 U.S.C. § 1540(g)(4). The parties dispute whether the ESA's fee shifting provision would apply to PL in this case.

PL asserts that it is a "party" under § 1540(g)(4) and so its petition for fees should be evaluated under the "appropriate" standard of that provision. PL argues the language of § 1540(g)(4) does not differentiate between plaintiffs and defendants and, therefore, it applies to PL's petition for fees. EPIC argues that the fee shifting provisions of ESA do not apply to defendants who are in PL's position and that the *Christiansburg* standard for prevailing defendants should apply.

The court finds that the ESA's fee shifting provisions do not apply to defendants who must rely on a record such as that confronting PL here. In *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 54 L. Ed. 2d 648, 98 S. Ct. 694 (1978), the Supreme Court decided what standard should be applied to a defendant's fee petition under Title VII.[5] The Court concluded that "a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Id.* at 421. The Ninth Circuit has applied the *Christiansburg* standard to a prevailing defendant under the Clean Water Act ("CWA") and the Resource Conservation and Recovery Act ("RCRA"). *Razore v. Tulalip Tribes of Washington*, 66 F.3d 236, 240 (9th Cir. 1995) (stating "we agree with the District Court that *Christiansburg Garment Co.* is the proper standard for RCRA and CWA suits").[6]

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[5] Title VII has a fee shifting provision which permits a "prevailing party" to obtain reasonable attorneys' fees. 42 U.S.C. § 2000e(5)(k). Although the language differs from the ESA's "any party" language in 16 U.S.C. § 1540(g)(4), the Supreme Court noted that both Title VII and several environmental statutes fall into a category which provides a district court with flexibility and discretion to provide attorneys' fees, thus "entrusting the effectuation of the statutory policy to the discretion of the district courts." *Christiansburg,* 434 U.S. at 416 & n.7.

[6] Contrary to PL's assertion, the Supreme Court's holding in *Bennett v. Spear*, 520 U.S. 154, 137 L. Ed. 2d 281, 117 S. Ct. 1154 (1997), does not contradict the holding in *Razore*. In *Bennett*, the Court addressed whether an entity asserting economic rather than environmental interests has standing to bring a citizen suit to enforce the *ESA*. 117 S. Ct. at 1160-63. The court ruled that such a party does have standing as "any person" under the citizen suit provision of the ESA, 16 U.S.C. § 1540(g)(1). *Bennett*, 117 S. Ct. at 1163. The court never addressed whether an entity asserting economic interests could receive fees under the "appropriate" standard of § 1540(g)(4). In spite of that fact, PL frames the Court's following language as drawing a relationship

In *Razore*, the defendant succeeded in a motion to dismiss, but because the plaintiff had presented a novel question, the court found that the suit was not frivolous or unreasonable and denied attorneys' fees for the defendant. *Id.* The Ninth Circuit came to a similar conclusion in *Western States Petroleum Ass'n. v. EPA*, 87 F.3d 280, 286 (9th Cir. 1996).[7] In that case, the court denied attorneys' fees to the plaintiff, "a financially able, nongovernmental party having no more than its own economic interests at stake." *Id.* The court explicitly rejected the Fifth Circuit's approach in *Florida Power & Light Co. v. Costle*, 683 F.2d 941, 943 (5th Cir. 1982) and concluded that:

> the legislative history indicates that Congress neither intended to subsidize all litigation under the Clean Air Act nor contemplated that § 307(f) [the fee shifting provision of that act] would benefit financially able parties who, out of their own substantial economic interests, would have litigated anyway. For this reason, we hold that [plaintiffs are] ineligible for a fee award under § 307(f).

87 F.3d at 286. Thus, under *Razore* and *Western States*, the Ninth Circuit has articulated that the *Christiansburg* standard applies to defendants acting with economic interests.[8]

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between the scope of standing in § 1540(g)(1) and the scope of the fee shifting provision under § 1540(g)(4):

> Although petitioners contend that their claims lie both under the ESA and the APA, we look first at the ESA because it may permit petitioners to recover their litigation costs, *see* 16 U.S.C. § 1540(g)(4), and because the APA by its terms independently authorizes review only when "there is no other adequate remedy in a court," 5 U.S.C. § 704.

Bennett, 117 S. Ct. at 1160-61. Clearly this language addresses under which statute the Court will analyze the standing issue. There is no justification in *Bennett* for extending that ruling to PL's motion for fees. This argument may be attractive on appeal, however this court is bound by the Ninth Circuit's ruling in *Razore*.

[7] Again, *Bennett* does not alter the holding in *Western States*, 87 F.3d at 286, which addressed the fee standard for plaintiffs pursuing economic interests. That case never addressed the standing issue resolved in *Bennett*.

[8] PL argues that *Razore* (and by implication, *Western States*) is incorrect in light of the Supreme Court's decision in *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 127 L. Ed. 2d 455, 114 S. Ct. 1023 (1994). In *Fogerty*, the court held that the *Christiansburg* standard for defendants was inapplicable under the Copyright Act, 17 U.S.C. § 505 and that plaintiffs and defendants were equally entitled to attorneys fees under the fee shifting provision of that statute. *Fogerty*, 510 U.S. at 533-34. Aside from the fact that

> Oftentimes, in the civil rights context, impecunious "private attorney general" plaintiffs can ill afford to litigate their claims against defendants with more resources. Congress sought to redress this balance in part, and to provide incentives for the bringing of meritorious lawsuits, by treating successful plaintiffs more favorably than successful defendants in terms of the award of attorney's fees.

Id. That rationale equally applies to the environmental statutes. The *Fogerty* court also noted that the fee shifting provisions in more analogous patent and trademark statutes support a "party-neutral approach." *Id.* at 525 n.12. The court does not find the holding in *Fogerty* as having any impact on the meaning this court should attribute to the later Ninth Circuit cases, other than reaffirming the *Christiansburg* standard.

PL seeks to distinguish *Razore* in its reply memorandum. (Defs.' Mem. in Reply at 4-10.) PL first argues that while *Christiansburg* has been extended to the CWA and RCRA, it has never been applied to the ESA in a published opinion. *Id.* at 5. This argument contradicts PL's citation in its original memorandum of law to *Ruckelshaus v. Sierra Club,* 463 U.S. 680, 77 L. Ed. 2d 938, 103 S. Ct. 3274 (1983), which addresses the issue of the Court's interpretation of the term "appropriate" under the Clean Air Act (CAA) as controlling under the CWA and the ESA. (Defs.' Mem. at 10.); *Ruckleshaus,* 463 U.S. at 682 n.1. PL also seeks to distinguish *Razore* in that the defendant there did not substantially contribute to the goals of the act. (Defs.' Mem. in Reply at 4-10.) PL then points to several cases in which courts contemplate granting defendants attorneys' fees under the fee shifting provisions which PL claims contradicts the holding in *Razore.* These cases do not support PL's argument.

First, PL cites *Sierra Club v. Shell Oil Co.,* 817 F.2d 1169, 1176 (5th Cir. 1987). In that case, the Fifth Circuit refused to disturb the district court's granting of litigation costs, including attorneys' fees, to defendant Shell Oil Company as "appropriate" under the CWA, 33 U.S.C. § 1365(d). *Id.* However, the circuit court merely stated that

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Razore and *Western States* were decided after *Fogerty*, the *Fogerty* court specifically distinguished the fee provision in the Copyright Act from the fee provisions of the civil rights statutes. *Fogerty,* 510 U.S. at 524. In doing so, the Court reaffirmed its rational for the *Christiansburg* standard under the civil rights statutes:

plaintiff Sierra Club had suggested "no basis for finding an abuse of discretion, and we perceive none." *Id.* This case does not present the court with a thoroughly reasoned example in which a defendant, presumably acting with economic motives, obtained fees under the fee shifting standard. Due to the lack of discussion on the issue, this case cannot stand as the turning point for the establishment of a rule of law regarding the recovery of fees by a defendant. Furthermore, the decision precedes the Ninth Circuit's binding precedent in *Razore.*

PL also cites *Carson-Truckee Water Conservancy Dist. v. Secretary of the Interior,* 748 F.2d 523, 526 (9th Cir. 1984). In that case, a Native American tribe, acting as an intervening defendant, failed to receive attorneys' fees under the ESA. The Ninth Circuit upheld the District Court's application of the "appropriate" standard to the defendant's request and the District Court's finding that fees were not appropriate in the case. *Id.* Based on that language, PL argues that the Ninth Circuit implicitly held that all defendants are eligible to receive fees under the "appropriate" standard. The court disagrees.

The plaintiffs in *Carson-Truckee* were a power company and the State of Nevada. *Id.* at 524. They sued officials of the Department of the Interior for economic reasons, to force the sale of impounded water for municipal and industrial use. *Id.* The tribe intervened as a defendant in order to block the sale sought by the plaintiffs, asserting that several endangered and threatened species of fish inhabited the water and its sale would violate the ESA. *Id.* Thus, the role of the intervening defendant in *Carson-Truckee* was analogous to EPIC in this case, rather than PL. Neither case cited establishes a rule of law in favor of PL. More importantly, the court can not and will not read those cases as overriding the more recent and binding ruling by the Ninth Circuit in *Razore.*

The Supreme Court has recognized that Congress' intent in creating the fee shifting provisions under certain statutes was to establish a "private attorney general" enforcement mechanism. *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,* 421 U.S. 240, 262, 44 L. Ed. 2d 141, 95 S. Ct. 1612 (1975) ("it is true that under some, if not most, of the statutes providing for the allowance of reasonable fees, Congress has opted to rely heavily on private enforcement to implement public policy and to allow counsel fees so as to encourage private litigation"). The fee shifting provisions of the environmental statutes encourage private citizens to bring suit under those statutes to preserve natural

public resources, despite the lack of pecuniary benefit to those entities.[9] While it is possible for a party aligned as a defendant to act in the interest of preserving public resources, as the intervening defendant in *Carson-Truckee* did, the Ninth Circuit decisions recognize a distinction between defendants acting on behalf of the public interest and those acting for their own economic benefit.

PL defended this litigation with the purpose of engaging in the harvest of timber on its property. PL did not defend this litigation for the primary purpose, or even a subsidiary purpose, of preserving a threatened or endangered species. PL argues that the Ninth Circuit's rulings produce the end result that the FWS is able to advise and consult with private parties and other governmental agencies regarding potential takes of endangered species without being required to engage in internal consultation. Regardless of the perceived benefits of these residual effects of the litigation, it does not follow that the PL was acting in the role of a private attorney general, reaching to fulfill the goals of the ESA, which the fee shifting provision was designed to encourage. The court finds that the fee shifting provisions of the ESA do not apply to PL in this case and that the petition should be evaluated under the *Christiansburg* standards. However, because PL contends that the Ninth Circuit has not explicitly ruled on the issue under the facts presented by this case, the court will evaluate the petition for fees under both the ESA's fee provision and the traditional and *Christiansburg* standards.

B. ESA'S "SUBSTANTIALLY CONTRIBUTED" STANDARD

As noted above, the ESA has altered the American Rule by permitting a court to "award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate." 16 U.S.C. § 1540(g)(4). The Ninth Circuit has held that when a court determines whether an award of fees is "appropriate" under an environmental statute's fee shifting provision, it looks to whether the party has "substantially contributed" to the goals of that statute. *See Carson-Truckee Water Conservancy*

[9] EPIC brought this claim on behalf of several endangered species, requesting injunctive relief that would have provided it with no economic benefit other than the potential for attorneys' fees under § 1540(g)(4).

Dist. v. Secretary of the Interior, 748 F.2d 523, 525-26 (9th Cir. 1984) (setting forth standard as whether party has "substantially contributed" to the goals of the relevant statute). Whether a party has substantially contributed to the goals of a statute can be measured by "whether litigation by that party has served the public interest by assisting the interpretation and implementation" of that statute. *Carson-Truckee*, 748 F.2d at 525 (citations omitted). The stated goals of the ESA are to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section." 16 U.S.C. § 1531(b). The question before the court is whether PL's litigation of this matter has substantially contributed to the preservation of an endangered species.

PL contends that it is entitled to attorneys' fees under 16 U.S.C. § 1540(g)(4) because it is a successful party who has substantially contributed to the goals of the ESA. PL asserts that it substantially contributed to the goals of the ESA because the Ninth Circuit rulings have facilitated communication and cooperation between the FWS, private parties and other governmental agencies and encouraged cost effective implementation of the ESA.[10] EPIC contends that PL has not substantially contributed to the goals of the ESA because the rulings merely maintained the status quo.[11]

In *Marbled Murrelet I*, the Ninth Circuit addressed whether the FWS's role in the exemption notice procedure constituted agency action under Section 7 of the ESA. *Marbled Murrelet v. Babbitt*, 83 F.3d

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[10] PL also argues that granting fees would discourage "meritless" litigation which it claims is a goal of the act. Discouraging meritless litigation is not a stated goal of the ESA but is rather the purpose of the traditional "bad faith" and *Christiansburg* standards for applying attorneys' fees. Regardless, PL's argument presupposes that EPIC's litigation was meritless, an issue which the court will address under the more appropriate *Christiansburg* analysis below.

[11] EPIC also argues that an application of attorneys' fees in this case would have a chilling effect on public interest environmental litigation. EPIC also argues that the court has no jurisdiction to grant attorneys' fees, that EPIC actually could be considered the prevailing party on the Section 9 claims and that the amount of attorneys' fees are unreasonable. The court will not address those arguments as the resolution of the motion for fees under § 1540(g)(4) and *Christiansburg* will dispose of those issues as well.

1068, 1075 (9th Cir. 1996). The Ninth Circuit held that it did not because the FWS did not exert "discretionary involvement or control over the Lumber Companies' proposed tree harvest operations." *Id.* In *Marbled Murrelet II*, the court addressed whether the FWS's letter of concurrence regarding PL's THPs constituted agency action. *Marbled Murrelet v. Babbitt,* 111 F.3d 1447, 1449-50 (9th Cir. 1997). The Ninth Circuit again held that the FWS had not engaged in agency action because it did not have the discretion to influence PL's activities. *Id.*

PL argues that the Ninth Circuit's rulings in its favor substantially furthered the goal of species preservation by facilitating communication between federal and state agencies and private parties in that the FWS may give advisory opinions without engaging in agency action and performing a biological survey. In support, PL cites to language in *Marbled Murrelet I* stating that if such advisory opinions were considered agency action, private parties would be less likely to request advice and input from the FWS in the future. (Defs.' Mem. at 12-13.) The Ninth Circuit did make it clear that "protection of endangered species would not be enhanced by a rule which would require a federal agency to perform the burdensome procedural tasks mandated by section 7 simply because it advised or consulted with a private party." *Marbled Murrelet I*, 83 F.3d at 1074. However, the result PL sought, furthered and obtained was the validity of its permits so that it could proceed in its planned harvests. The court cannot conclude that PL's pursuit of conducting a timber harvest serves the public interest in implementing the ESA's goals of preserving endangered and threatened species. Because PL sought advice and consultation from the federal agency before the litigation and will, presumably, continue to do so after this litigation, the court cannot find that PL acted in such a way as to substantially contribute to the goals of species preservation and an award of fees for its part in the litigation would be inappropriate. The court will not grant PL attorneys' fees under the ESA's fee shifting provision.

C. TRADITIONAL AND *CHRISTIANSBURG* STANDARDS

Finally, the court will address whether PL is entitled to attorneys' fees under the traditional or *Christiansburg* standards. As noted above, a court has the inherent power to assess attorney's fees when a party has

"acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,* 421 U.S. 240, 258-259, 44 L. Ed. 2d 141, 95 S. Ct. 1612 (1975) (internal quotations omitted). Additionally, under *Christiansburg*, "a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII [civil rights] case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 421-22, 54 L. Ed. 2d 648, 98 S. Ct. 694 (1978). Although the *Christiansburg* standard developed under civil rights statutes, the court will apply the *Christiansburg* standard to EPIC's claims under the ESA. *See Razore v. Tulalip Tribes of Washington*, 66 F.3d 236, 240 (9th Cir. 1995). Evaluating EPIC's ESA Section 9 claims under the *Christiansburg* standard, the court finds that EPIC did not engage the court or the parties in frivolous, unreasonable or foundationless litigation.[12]

PL argues that EPIC brought the Section 9 claim without supporting evidence and that it continued to litigate the claim without such evidence. PL cites strong wording used by the court in ruling on EPIC's motion to amend its Section 9 claims. PL misses the key distinction between a claim which a court cannot permit to continue and a claim that is frivolous, unreasonable or without foundation under the *Christiansburg* standard. In *Christiansburg*, the Supreme Court made several observations regarding the scrutiny of a plaintiff's case which are relevant here:

> It is important that a district court resist the understandable temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of

[12] Although PL seeks attorneys' fees for the entire litigation, PL does not claim that EPIC's Section 7 claims were frivolous, unreasonable or without foundation. As such, the court will only analyze the Section 9 claims under the *Christiansburg* standard. However, the court notes that the Section 7 claims would not be held frivolous, unreasonable or without foundation. EPIC's Section 7 claims were based on a complex area of evolving law and EPIC raised issues that made it clear it had good grounds to advance their arguments. As PL itself recognized in their brief, the litigation raised "an issue of first impression." (Defs.' Mem. at 12.)

> ultimate success. No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.

Christiansburg, 434 U.S. at 421-22. Evaluating EPIC's Section 9 claims in that light, it cannot be said that the claims were frivolous, unreasonable or without foundation.

EPIC's case was not frivolous for a number of reasons. First, EPIC points out that its decision to litigate the Section 9 claims was based on expert opinions that the planned activities would cause harm to endangered or threatened species. Second, EPIC argues that the threat of litigating PL's plan to harvest timber with the use of helicopters, which EPIC contended would disturb the forest canopy with gale force winds, acted as a catalyst in PL's subsequent change of plans to exclude the use of helicopters. Though PL's rationale in changing the method of timber harvest was not fully explored through a hearing, one likely explanation for the change is EPIC's litigation of the matter. Third, EPIC points out that the litigation and threat of a temporary restraining order altered the course of PL's planned activities in removing downed trees, which EPIC contended would harm Marbled Murrelets. Fourth and most importantly, the court notes the difficulty in gathering evidence for the Section 9 claim prior to filing suit and formal discovery. The proposed timber harvests and alleged takes of the Murrelets occurred on privately owned land. To fully develop evidentiary support, EPIC needed access to the land that would have been largely unnecessary on public land. Evidence of the logging activities' nature and data on the nesting habits of the Marbled Murrelets and the Northern Spotted Owls were difficult to gather without first bringing suit to force PL to open the property to EPIC. Difficulties on both PL's side as a landowner being asked to allow strangers to roam its land and EPIC's side in getting the freedom of access it needed were predictable. With the knowledge that EPIC had at the outset, additional evidence obtainable through access by way of

litigation was not an unreasonable expectation to rely upon in bringing suit.

In retrospect, the changes which occurred and the reasons therefore in PL's harvest plans are difficult to surmise, as are EPIC's motives and evidentiary support for the litigation. While EPIC claims to have altered the course of PL's activities for the betterment of endangered or threatened species, PL speculates that EPIC's motives were improper and its evidentiary basis lacking. The court finds that this is the exact type of situation that the Supreme Court anticipated in setting the *Christiansburg* standard for finding frivolous, unreasonable or foundationless litigation. The court will refrain from engaging in the post hoc reasoning and hindsight logic that the Supreme Court warned against. The court will not award attorneys' fees under the *Christiansburg* standard. The court also finds no evidence supporting a finding of bad faith or improper motive under the traditional standard.

D. COSTS

The court denies the request for costs to the extent they are requested under 16 U.S.C. § 1540(g)(4). The court notes that the prevailing parties may be entitled to other costs, such as taxable costs. However, the court is unable to deduce from the filings what costs have been assessed by the Clerk of Court and whether either party objects to the Clerk's assessment. As such, the court will deny the Defendants' motion for costs. However, Defendants may bring the appropriate motions to request any costs they are entitled to under other relevant federal and local rules.

E. SUMMARY

The court finds that the fee shifting provisions of the ESA do not apply to PL and that the motion should be evaluated under the *Christiansburg* and the traditional "bad faith" standard. Even if the ESA's fee provision was applicable, the court would not grant PL fees because PL did not substantially contribute to the goals of the ESA. The court declines to grant PL fees under the *Christiansburg* standard or the "bad faith" standard because EPIC's litigation was not frivolous, unreasonable or without foundation. The court will not grant costs under the ESA, but the defendants may bring the appropriate motions

to request any costs they are entitled to under other relevant federal and local rules.

III. CONCLUSION

For the foregoing reasons, the motion will be denied. An appropriate Order follows.

ORDER

AND NOW, TO WIT, this 30th day of March, 1998, upon consideration of defendants Pacific Lumber Company, Scotia Pacific Holding Company and Salmon Creek Corporation's petition for attorneys' fees and plaintiffs Marbled Murrelet, Northern Spotted Owl and Environmental Protection Information Center, Inc.'s opposition thereto, IT IS ORDERED that said motion is DENIED.

APPENDIX D

MARBLED MURRELET *(Brachyramphus marmoratus)*, NORTHERN SPOTTED OWL *(Strix occidentalis caurina)* and ENVIRONMENTAL PROTECTION INFORMATION CENTER, INC.

v.

BRUCE BABBITT, MOLLIE BEATTIE, MICHAEL SPEAR, U.S. FISH & WILDLIFE SERVICE, THE PACIFIC LUMBER COMPANY, SCOTIA PACIFIC HOLDING COMPANY and SALMON CREEK CORPORATION

No. C 95-3261 LCB

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

1997 U.S. Dist. LEXIS 9138

June 24, 1997, Filed

DISPOSITION: Defendants' motions for summary judgment GRANTED.

COUNSEL: For MARBLED MURRELET *(Brachyramphus marmoratus)*, NORTHERN SPOTTED OWL *(Strix occidentalis caurina)*, ENVIRONMENTAL PROTECTION INFORMATION CENTER, Plaintiffs: Sharon E. Duggan; Law Offices of Sharon E. Duggan, San Francisco, CA. Thomas N. Lippe, Law Offices of Thomas N. Lippe, San Francisco, CA.

For BRUCE BABBITT, Sec Dept/Interior, MOLLIE BEATTIE, Dir. of U.S. Fish, MICHAEL SPEAR, U.S. Fish & Wildlife, defendants: Patrick R. Bupara, AUSA, Michael J. Yamaguchi, USAtty, U.S. Attorney's Office, San Francisco, CA. James C. Kilbourne, Christiana P. Perry, Ellen J. Kohler, US Dept of Justice, Environment & Natural Resources Div, Washington, DC. Lois R. Schiffer, U.S. Department of

Justice, Environment & Natural Resources Division, Wildlife & Marine Resources Section, Washington, DC.

For UNITED STATES FISH AND WILDLIFE SERVICE, defendant: Patrick Ramirez, U.S. Attorney's Office, San Francisco, CA. Ellen J. Kohler, (*See* above).

For PACIFIC LUMBER COMPANY, a Delaware Corporation, SCOTIA PACIFIC HOLDING COMPANY, a Delaware Corporation, SALMON CREEK CORP, a Delaware Corporation, defendants: Alson R. Kemp, Andrea Gross, David W. Trotter, Pillsbury Madison & Sutro LLP, San Francisco, CA. Jared G. Carter, Frank Shaw Bacik, Rawles Hinkle Carter Benke & Oglesby, Ukiah, CA.

JUDGES: Louis C. Bechtle, J.

OPINION BY: Louis C. Bechtle

Presently before the court are two motions for summary judgment. One was filed by Defendants Bruce Babbitt, Mollie Beattie, Michael Spear, and the United States Fish and Wildlife Service (the "Federal Defendants"), and the other was filed by Defendants The Pacific Lumber Company, Scotia Pacific Holding Company, and Salmon Creek Corporation ("PL"). Plaintiffs have filed opposing briefs. For the reasons set forth below, the court will grant the motions.

I. BACKGROUND

Plaintiffs brought this civil action to block PL from engaging in commercial timber harvesting operations on their 200,000 acres of private property in Humboldt County, California. The property contains old-growth redwood forest stands that provide a habitat for Plaintiffs Marbled Murrelet and Northern Spotted Owl. The Marbled Murrelet is a secretive seagoing bird that the United States Fish and Wildlife Service (the "Service") has listed as "threatened" under the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 et seq. The Northern Spotted Owl is listed as "endangered" under the ESA.

Plaintiffs seek to block PL from logging pursuant to several approvals issued by a state agency. They originally sought relief on two grounds. First, they claimed that the Service had sufficient involvement in the approval of the logging to require it to consult internally and

prepare a report assessing the logging's effect on the environment, including the effect on protected species. These claims were brought under Section 7 of the ESA, 16 U.S.C. § 1536, and Section 102(2)(C) of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332(2)(C).[1] Second, Plaintiffs claimed that PL's harvesting of timber in the relevant areas would cause a "take"[2] of Marbled Murrelets in violation of Section 9 of the ESA, 16 U.S.C. § 1538. Plaintiffs' Section 9 claim no longer is before the court.[3]

Defendants' summary judgment motions involve only the analogous claims under NEPA and Section 7 of the ESA. These claims relate to two separate kinds of timber harvesting approvals by the California Department of Forestry and Fire Protection ("CDF"). The court will refer to these distinct approval types as the "Exemption Harvests" and the "Timber Harvest Plans," or "THPs." Because the court has addressed each type of approval separately, it will separately describe the factual and procedural history and regulatory framework for each category.

A. THE EXEMPTION HARVESTS

Commercial timber operations in California are comprehensively regulated by the Z'berg-Nejedly Forest Practice Act of 1973 (the "FPA"), Cal. Pub. Res. Code § 4511 et seq., and the Forest Practice Rules promulgated by the California Board of Forestry (the "Board"). Persons who want to harvest timber usually must submit a THP prepared by a registered professional forester ("RPF") to CDF. Cal. Pub. Res. Code § 4581. Persons who want to harvest "dead, dying or diseased trees" are exempt from the THP requirement and must follow a different procedure. *See* Cal. Pub. Res. Code § 4584; 14 Cal. Code Reg. § 1038(b). They need only submit an "exemption notice" of the

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[1] Plaintiffs filed their ESA claims under the citizen-suit provision of that statute. 16 U.S.C. § 1540(g)(2)(A)(1). Because NEPA does not contain a private right of action, the court has interpreted Plaintiffs' NEPA claim as a claim under the Administrative Procedure Act because it seeks review of a final agency decision. 5 U.S.C. § 704.

[2] The word "take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." 16 U.S.C. § 1532(19).

[3] On January 13, 1997, the court granted Plaintiffs' motion to voluntarily dismiss the Section 9 claim with prejudice.

proposed timber operation, not a formal plan. 14 Cal. Code Reg. § 1038.

After CDF receives an exemption notice, it has ten working days to determine only whether the notice is "complete and accurate." 14 Cal. Code Reg. § 1038(e). If it is, the agency sends a notice of acceptance to the submitter, and the proposed harvesting of "dead, dying or diseased trees" may begin. *Id.* If it is not complete and accurate, CDF returns the notice to the submitter, and no logging may occur. *Id.* If CDF does not act within ten days of receipt of the exemption notice, the submitter may commence the logging. *Id.* Under the relevant state statutes and regulations, no federal agency is called upon to play a role in accepting an exemption notice or returning one as incomplete or inaccurate.

The following are the undisputed relevant facts concerning the Exemption Harvests. In late 1994, PL submitted, and CDF accepted, two exemption notices to harvest dead, dying, and diseased timber on nearly all of PL's property. On March 1, 1995, PL submitted a similar notice for a separate parcel that included the Headwaters Forest, which is the largest remaining old-growth redwood forest that is privately owned. The notice was accompanied by a letter noting that "a substantial portion of the timberland contains timber and habitat that are not now often found on privately owned timberland, namely previously unentered old-growth redwood forests."

On March 6, 1995, CDF returned the notice and asked PL to provide the location and habitat of any rare, endangered, or threatened species. Two days later, PL resubmitted the notice with five pages of maps revealing the areas that were important to such species. On March 15, 1995, CDF accepted PL's resubmitted notice and stated that PL could harvest timber that could alter the habitat of protected species only after a consultation with and an on-site inspection by the California Department of Fish and Game ("DFG") and the Service. On March 17, 1995, CDF notified PL that it had imposed, and PL had agreed to, several conditions, including "an on-site inspection . . . whereby the agencies must approve the cutting of any standing trees."

On March 24, 1995, PL objected to several of the conditions imposed by CDF. Four days later, the issues were discussed by a PL resources manager and Service and DFG officials. On April 12, 1995, the Service and DFG sent a joint letter to PL describing several conditions that must be complied with to avoid a "take" of Marbled

Murrelets and Northern Spotted Owls under the ESA and analogous state requirements. On May 3, 1995, PL notified DFG and the Service that the conditions were too restrictive and that it was considering filing an action for inverse condemnation against California and the United States.

On July 18, 1995, the Service and CDF clarified the conditions of the April 12 letter. On September 1, 1995, PL told CDF, DFG, and the Service that they would comply with all conditions set forth in the previous correspondence. They also stated that they intended to begin harvesting dead, dying, and diseased timber in the Headwaters Forest soon after September 15, 1995, the last day of the Marbled Murrelet's breeding season.

On that date, Plaintiffs filed a Complaint and a Motion for a Temporary Restraining Order to enjoin PL from commencing the Exemption Harvests. On the same day, the Honorable Maxine M. Chesney of this court granted the motion. On September 29, 1995, Judge Chesney granted Plaintiffs' Motion for a Preliminary Injunction, a ruling that PL appealed to the United States Court of Appeals for the Ninth Circuit. On May 7, 1996, that court vacated the injunction, holding that there were no serious questions whether the Service engaged in "agency action" under Section 7 of the ESA or a "major Federal action" under NEPA. *Marbled Murrelet v. Babbitt,* 83 F.3d 1068, 1075 (9th Cir. 1996) *("Marbled Murrelet I").*

On July 1, 1996, the Federal Defendants filed a motion to dismiss or, in the alternative, for summary judgment on the Exemption Harvest and THP issues. On the same day, PL filed summary judgment motion covering both claims. Plaintiff Environmental Protection Information Center, Inc. ("EPIC") filed responsive briefs on July 12, 1996. On July 30, 1996, the court heard oral argument on the motions.

On August 26, 1996, EPIC filed a Renewed Motion for Preliminary Injunction, asking the court to again enjoin PL from commencing the Exemption Harvests. Defendants filed briefs in opposition to the motion. On September 13, 1996, while its preliminary injunction motion was pending, EPIC moved for a temporary restraining order, incorporating the documents it filed in its preliminary injunction motion. On September 17, 1996, the court denied EPIC's motion, rejecting the arguments it offered as part of its Renewed Motion for a Preliminary Injunction. On October 2, 1996, the court

heard oral argument on the Renewed Motion for a Preliminary Injunction.

B. THE TIMBER HARVEST PLANS

As stated above, persons who want to harvest timber in California must submit a THP, unless an exemption applies. Cal. Pub. Res. Code § 4581. The California Board of Forestry (the "Board") has promulgated a special rule for THPs that are in the range of the Northern Spotted Owl. *See* 14 Cal. Code Reg. § 919.9. The pertinent part of this section states:

> Every proposed timber harvesting plan . . . shall follow one of the procedures required in subsections (a)-(g) below for the area within the THP boundary as shown on the THP map and also for adjacent areas as specified within this section. The submitter may choose any alternative (a)-(g) that meets the on-the-ground circumstances. The required information shall be used by the Director to evaluate whether or not the proposed activity would result in the "take" of an individual northern spotted owl.

Id. Section § 919.9(e) states:

> If the plan submitter proposes to proceed pursuant to the outcome of a discussion of the proposed THP between the plan submitter and the U.S. Fish and Wildlife Service, the plan submitter shall submit written documentation in the form of a letter prepared by the RPF that the described or proposed management prescription is acceptable to the USFWS.

14 Cal. Code Reg. § 919.9(e).

A plan submitter proceeding under this subsection need not obtain the Service's approval for each THP; rather, it must submit to CDF a letter stating that the "proposed management prescription is acceptable" to the Service. The submitter's "proposed management prescription," which in this case is a property-wide strategy for logging without "taking" the owl, is kept on file with CDF and is incorporated by reference in each THP. If the submitter's management plan changes, a revised letter from the Service is required.

After an application is submitted, CDF must determine within ten days whether a THP is "accurate, complete and in proper order" and whether a preharvest inspection of the proposed logging area is necessary. 14 Cal. Code Reg. § 1037. CDF has fifteen days from the initial inspection (or, if no inspection was deemed necessary, the date of filing) to review the THP and take public comments to determine whether it complies with the applicable statutes and Forest Practice Rules. 14 Cal. Code Reg. § 1037.4. After the review and comment period, CDF has ten working days to determine whether the THP conforms to the applicable law *Id.* If it does not, CDF must return the plan to the submitter, along with any changes or reasonable conditions that would bring the THP into conformance with the rules. 14 Cal. Code Reg. § 1037.6. An appeal by the plan submitter must be filed within ten days of receipt of the returned plan. Cal. Pub. Res. Code § 4582.7(c). If the Director does not act on the THP within twenty-five days, timber operations may commence. Cal. Pub. Res. Code § 4582.7(d). If the Director determines that the THP conforms to the applicable rules, "the person submitting the plan shall be notified, and timber operations thereunder may commence." 14 Cal. Code Reg. § 1037.7.

Because the Northern Spotted Owl exists throughout PL's property, it must comply with one of the seven subsections of Section 919.9. For reasons concerning cost and practicality, PL has chosen to proceed exclusively under subsection (e). Under that provision, PL needed "written documentation in the form of a letter prepared by the RPF that the described or proposed management prescription is acceptable to the USFWS."

In November 1992, PL prepared a Spotted Owl Management Plan (the "Owl Management Plan"), which allows PL to consistently plan its timber operations in light of various factors, such as the types of timber needed, the availability of equipment and crews, and the numerous seasonal wildlife restrictions that permit harvesting to occur only in very narrow time frames. On November 20, 1992, the Service sent to PL a letter of "Concurrence with Spotted Owl Management Plan," which states that the Service has reviewed the Owl Management Plan and "concurs that activities conducted on [PL] property in compliance with this Plan likely will not result in take of northern spotted owls, provided that such activities also comply with conditions specified in this response."

CDF considers this letter to be "written documentation in the form of a letter prepared by the RPF that the described or proposed management prescription is acceptable to the USFWS" within the meaning of 14 Cal. Code Reg. § 919.9(e). Thus, the letter remains on file with CDF and is incorporated by reference in all of PL's THP submissions to CDF. PL can not obtain approval of a THP under § 919.9(e) without the Service's concurrence letter.

In January 1996, PL revised its Owl Management Plan and, on February 2, 1996, the Service sent PL a second concurrence letter, stating, as the 1992 letter had, that "the Service concurs that activities conducted on [PL] property in accordance with this plan are not likely to result in take of northern spotted owls."

With a concurrence letter on file with CDF, PL in 1995 submitted the eight THPs that are at issue in this litigation. The THPs cover about 1373 acres of its land. On March 7, 1996, Plaintiffs filed an expedited motion for a temporary restraining order and a preliminary injunction. Plaintiffs alleged that the Service violated NEPA and Section 7 of the ESA by providing PL with the concurrence letters without first complying with the statutes' procedural requirements, namely, consulting internally and preparing a biological opinion or environmental impact statement. On March 15, 1996, after a telephone conference with counsel, the court issued a Temporary Restraining Order enjoining PL from harvesting timber under the eight THPs.

On April 3, 1996, after a hearing, the court entered a preliminary injunction preventing PL from conducting or allowing any timber harvesting activities of any kind within the boundaries of the eight THPs, "to the extent that they were obtained pursuant to 14 Cal. Code Reg. § 919.9(e)." Pacific Lumber appealed this ruling.

While the appeal was pending before the Ninth Circuit, PL resubmitted or amended some of the THPs so that CDF could consider them under a subsection of 14 Cal. Code Reg. § 919.9 other than subsection (e). Between April 7 and November 26, 1996, the court ruled that the injunction no longer applied to six of the eight THPs because they had been approved under subsection (a). On April 18, 1997, the Ninth Circuit vacated the preliminary injunction, *Marbled Murrelet v. Babbitt*, 111 F.3d 1447 (9th Cir. 1997) *("Marbled Murrelet II")*, enabling PL to commence the two THPs that had not been released from the injunction.

II. STANDARD FOR SUMMARY JUDGMENT

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Whether a genuine issue of material fact is presented will be determined by asking if "a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

On a motion for summary judgment, the non-moving party has the burden to produce evidence to establish prima facie each element of its claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). Such evidence and all justifiable inferences that can be drawn from it are to be taken as true. *Anderson*, 477 U.S. at 255. However, if the non-moving party fails to establish an essential element of its claim, the moving party is entitled to a judgment dismissing that claim as a matter of law. *Celotex*, 477 U.S. at 322-23.

III. DISCUSSION

A. THE ENDANGERED SPECIES ACT

The pertinent part of Section 7 of the ESA provides:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical . . . .

16 U.S.C. § 1536(a)(2). This requirement applies to the Service, even though it is the agency to be consulted with respect to the Marbled Murrelet. 50 C.F.R. § 402.01(b). This process, known as "internal consultation," is accomplished by formally or informally "consulting" before engaging in an action that may affect a protected species. *See* 50 C.F.R. § 402.14(a). If the action may adversely affect an endangered or

threatened species or its critical habitat, the agency must initiate formal consultation and the Service must prepare a biological opinion. 50 C.F.R. § 402.14(h)(3).

An internal consultation need not occur every time the Service takes action. The consultation is necessary only before it engages in an action in which it has discretionary involvement or control. 50 C.F.R. § 402.03. Federal regulations define "action" as including "(a) actions intended to conserve listed species or their habitat; (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air." 50 C.F.R. § 402.02.

The Ninth Circuit's rulings on the two interlocutory appeals provide guidance on what "agency action" means when the Service participates in a private company's effort to comply with environmental laws to obtain approval from a state agency to harvest timber. In both rulings, the court held that the Service did not engage in "agency action" under the ESA because there was no "discretionary Federal involvement or control" over PL's logging activities.

In *Marbled Murrelet I*, the Ninth Circuit found that the Service, with respect to the Exemption Harvests, "merely provided advice on how [PL] could avoid a 'take' under section 9 of the ESA." 83 F.3d at 1074. The court held that, "as a matter of law, such advisory activity does not constitute discretionary involvement or control over [PL's] proposed tree harvest operations." *Id.* at 1075. Thus, as long as the Service advises a person who submits an exemption notice on how to avoid a take of protected species so as to comply with Section 9, the Service does not engage in "agency action."

In *Marbled Murrelet II*, the Ninth Circuit found that state law vests CDF with sole authority to make a final determination as to whether a proposed THP will result in a take of a protected species. 111 F.3d at 1449-50. Based on this finding, the court held that "CDF, not [the Service], has the discretion to influence the private action at issue." 111 F.3d at 1450. Accordingly, when the Service provides PL with a concurrence letter, which is essential to CDF approval of a THP under 14 Cal. Code Reg. § 919.9(e), it does not engage in "agency action."

B. THE EXEMPTION HARVESTS

Having summarized the relevant facts and the Ninth Circuit's rulings regarding the Exemption Harvests and the THPs, the court must now determine whether Plaintiffs have submitted evidence that would enable a reasonable jury to find in their favor on the Section 7 claim. The court will view the evidence in the light most favorable to Plaintiffs.

First, Defendants are entitled to summary judgment on this claim based on the Ninth Circuit's holding in *Marbled Murrelet II* that there was no discretionary federal involvement or control in the approval of the THPs under state law. The same regulatory scheme vests CDF—and not the Service—with the exclusive final authority to accept or reject an exemption notice. In this context, there is no principled basis to distinguish between CDF's acceptance of an exemption notice and its approval of a THP because the Service plays no role in either determination. The Service may be providing information or its opinions about the likelihood of a take to either CDF or the plan submitter, but the federal agency does not have the authority to approve a plan or accept an exemption notice. For this reason, the court believes that the Ninth Circuit's holding in *Marbled Murrelet II* is dispositive of Plaintiffs' claim here.

Second, Defendants are entitled to summary judgment for the reasons contained in the court's Memorandum and Order of September 17, 1996, which denied EPIC's motion for a temporary restraining order. In its motion, EPIC presented several theories[4] to support the notion that the Service had engaged in "agency action." Those theories were that (1) the Service authorized the Exemption Harvests by accepting CDF's delegation of authority to determine "take" of federally listed species; (2) DFG was the Service's agent in reviewing PL's exemption notices and THPs; (3) the Service carried out "an action to conserve listed species or their habitat" under 50 C.F.R. § 402.02; (4) the Service has interpreted Section 7 to require formal consultation when it enters into agreements with private landowners that are similar to its agreement with PL's Owl Management Plan; (5)

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[4] These theories were set forth in EPIC's supplemental brief in opposition to Defendants' summary judgment motions and its brief in support of its renewed motion for preliminary injunction. EPIC incorporated by reference the latter brief in its motion for a temporary restraining order.

the Service may have funded DFG activities necessary for PL to perform the Exemption Harvests; and (6) the Service's exercise of Section 9 enforcement authority gave it discretionary authority and control over the Exemption Harvests.

In its Memorandum, the court rejected all these arguments based on the general principle that, just as the Service does not engage in "agency action" when it provides technical assistance or informal guidance to private companies as to whether and to what extent a proposal to harvest trees might affect a listed species (as the Ninth Circuit held in *Marbled Murrelet I*), the Service does not engage in agency action when providing similar advice and assistance to a state agency that has a similar interest in enforcing laws to protect listed species. The court hereby incorporates by reference the reasoning set forth in that Memorandum and Order at Pages 9 and 10.[5]

Based on the Ninth Circuit's rulings, Defendants are entitled to summary judgment on Plaintiffs' claim relating to the Exemption Harvests.

C. THE TIMBER HARVEST PLANS

In *Marbled Murrelet II*, the Ninth Circuit, contrary to this court's earlier finding, held that "there is no evidence of federal discretionary involvement or control over [PL's] THPs." 111 F.3d at 1450. Regardless of whether this court agrees with the Ninth Circuit's holding, it must now conclude that, as a matter of law, the Service did not engage in "agency action" under Section 7 of the ESA when it issued the concurrence letters that were necessary for PL to proceed with its THP harvest activity. Defendants are thus entitled to summary judgment on Plaintiffs' claim relating to the THPs.

D. THE NATIONAL ENVIRONMENTAL POLICY ACT

Because the court has found that the Service did not engage in "agency action" under Section 7 of the ESA, it follows that the Service has not engaged in a "major Federal action" under NEPA's more exclusive standard. *Marbled Murrelet I*, 83 F.3d at 1075. Defendants,

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[5] In light of *Marbled Murrelet II*, the court will not incorporate Footnote 3 on Page 10 of its Memorandum of September 17, 1996, which distinguishes between Plaintiffs' claims concerning the Exemption Harvests and the THPs.

therefore, are entitled to summary judgment on Plaintiff's NEPA claims.

IV. CONCLUSION

For the reasons set forth above, there is no genuine dispute as to any material fact and Defendants are entitled to judgment as a matter of law on all claims. Accordingly, the court will grant Defendants' motions for summary judgment.[6] Because the court will enter judgment in favor of Defendants and against Plaintiffs, it will not consider EPIC's renewed motion for a preliminary injunction.

An appropriate Order follows.

ORDER

AND NOW, TO WIT, this 18th day of June, 1997, upon consideration of Bruce Babbitt, Mollie Beattie, Michael Spear, and the U.S. Fish & Wildlife Service's Motion to Dismiss or, in the Alternative, for Summary Judgment, and Plaintiff Environmental Protection Information Center, Inc.'s opposition thereto, IT IS ORDERED that said motion is GRANTED.

Upon consideration of The Pacific Lumber Company, Scotia Pacific Holding Company, and Salmon Creek Corporation's Motion for Summary Judgment, and Plaintiff Environmental Protection Information Center, Inc.'s opposition thereto, IT IS ORDERED that said motion is GRANTED.

Judgment is entered in favor of Defendants and against Plaintiffs on the claims under Section 7 of the Endangered Species Act and the National Environmental Policy Act.

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[6] The Federal Defendants also moved under Federal Rule of Civil Procedure 12(b)(1) on the ground that the court lacks subject-matter jurisdiction over Plaintiffs' ESA and NEPA/APA claims. The court's conclusion that, under the facts submitted, no reasonable jury could find that the Service engaged in "agency action" or "major Federal action" compels the conclusion that the court lacks subject-matter jurisdiction over Plaintiffs' claims. Thus, the court will grant Defendants' motion under Rule 12(b)(1).

APPENDIX E

MARBLED MURRELET *(Brachyramphus marmoratus)*; NORTHERN SPOTTED OWL *(Strix occidentalis caurina)*; ENVIRONMENTAL PROTECTION INFORMATION CENTER,

v.

BRUCE BABBITT, Secretary, U.S. Department of Interior, Defendant, and PACIFIC LUMBER COMPANY, a Delaware Corporation; SCOTIA PACIFIC HOLDING COMPANY, a Delaware Corporation; SALMON CREEK CORPORATION, a Delaware Corporation,

No. 96-15617

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

111 F.3d 1447; 1997 U.S. App. LEXIS 7648; 44 ERC (BNA) 1126; 97 Cal. Daily Op. Service 2847; 97 Daily Journal DAR 5029; 27 ELR 21141

November 4, 1996, Argued, Submitted, San Francisco,

April 18, 1997, Filed

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of California. D.C. No. CV-95-03261-LCB. Louis Charles Bechtle, District Judge, Presiding.

DISPOSITION: Preliminary injunction is VACATED.

COUNSEL: Jared G. Carter, Rawles, Hinkle, Carter, Behnke & Oglesby, Ukiah, California, for the defendants-appellants.

Thomas N. Lippe, Law Offices of Thomas N. Lippe, San Francisco, California, for the plaintiffs-appellees.

JUDGES: Before: William A. Norris, Alex Kozinski and A. Wallace Tashima, Circuit Judges

OPINION BY: William A. Norris, J.

In an action filed on behalf of the marbled murrelet and the northern spotted owl under the Endangered Species Act ("ESA") and under the National Environmental Policy Act ("NEPA"), Appellee Environmental Protection Information Center ("EPIC") secured a preliminary injunction enjoining Appellants from conducting logging activities in Humboldt County, California pursuant to eight Timber Harvest Plans ("THPs").

The district court granted EPIC's motion for the preliminary injunction because in its view, EPIC had demonstrated (1) the existence of serious questions on the merits as to whether ESA and NEPA had been violated, and (2) a balance of hardships tipping in its favor. Memorandum and Order, filed Apr. 9, 1996, at 39. Because we believe EPIC has failed to demonstrate the existence of serious questions on the merits as to whether ESA and NEPA have been violated, we VACATE the preliminary injunction.

Before addressing the merits of the preliminary injunction, we turn briefly to the question whether the district court properly exercised jurisdiction over EPIC's ESA claim.

Appellants argue that the district court lacked subject matter jurisdiction over EPIC's ESA claim because EPIC failed to give sixty days notice of intent to sue under § 7 of ESA, as required by § 11(g) of that Act. *See* 16 U.S.C. § 1540(g)(2)(A)(i). EPIC responds that the requisite sixty day notice of intent to sue was contained in EPIC's March 21, 1995 and April 3, 1995 letters to Appellants, the United States Fish and Wildlife Service ("FWS") and the California Department of Forestry and Fire Protection ("CDF").

Because we rule in favor of Appellants on the merits, we need not resolve the fact-specific question whether EPIC's letters gave the required notice of intent to sue.

On the merits, we disagree with the district court that EPIC has raised serious questions as to whether FWS engaged in "agency action," as defined in § 7(a)(2) of ESA. Specifically, we disagree with the district court that the FWS concurrence letters were "tantamount to an approval of [Appellants'] THPs under § 919.9(e)." Memorandum and

Order, filed Apr. 9, 1996, at 23. Our review of this finding requires a brief review of the statutory landscape.

In California, THPs must be approved by CDF. Cal. Pub. Res. Code § 4581. To obtain CDF approval of a THP, plan submitters must proceed in accordance with one of seven alternative procedures for providing information to the Director of CDF. Cal. Code Regs. tit. 14, § 919.9. The information is used by the Director to evaluate whether or not the proposed activity would result in the "take"[1] of an individual northern spotted owl. *Id.*

The FWS concurrence letters are at issue because Appellants chose to proceed under § 919.9(e), an option which allows CDF, in making its evaluation, to consider an opinion by FWS that the planned timber operations will not likely result in a take of the owl. *See* Cal. Code Regs. tit. 14, § 919.9(e).[2] The concurrence letters were two such opinions.

EPIC argues that the district court was correct that there was a serious question as to whether, in issuing the concurrence letters, FWS engaged in agency action. In its view, CDF delegated its authority to protect endangered species to FWS in Rule 919.9(e), and FWS, in issuing the concurrence letters, accepted that delegation. Appellees' Br. at 19. Thus, according to EPIC, by approving Appellants' Northern Spotted Owl Plan, FWS "enabled [Appellants] to obtain the approval of its THPs by CDF. In essence, [FWS] granted [Appellants] a subsidiary permit necessary for [Appellants] to obtain a permit from CDF." *Id.*

Appellants argue that as a matter of state law, approval of and control over any particular THP rests exclusively with the Director of CDF. *See* Cal. Pub. Res. Code § 4582.7(e) (providing that the director "shall have the final authority to determine whether a [THP] is in conformance with the [applicable] rules and regulations"); *Sierra Club v. State Board of Forestry,* 7 Cal. 4th 1215, 1220, 876 P.2d 505 (1994)

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[1] A "take" occurs when a party "harasses, harms, pursues, hunts, shoots, wounds, kills, traps, captures, or collects, or . . attempts to engage in any such conduct." 16 U.S.C. § 1532(19).

[2] Option (e) provides: "If the plan submitter proposes to proceed pursuant to the outcome of a discussion of the proposed THP between the plan submitter and [FWS], the plan submitter shall submit written documentation in the form of a letter . . .[stating] that the described or proposed management prescription is acceptable to [FWS]." Cal. Code Regs. tit. 14, § 919.9(e).

(noting that "the [California Board of Forestry] has the ultimate power of approval over a [THP]"). In their view, the state law requirement in § 919.9(e) that Appellants consult with and obtain advice from FWS does not convert that consultation and advice into some kind of "de facto" approval process. Appellants' Br. at 34. The concurrence letters, they argue, "merely set forth FWS' views on how to avoid a violation of [ESA] section 9." *Id.* at 36.[3]

In *Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1074 (9th Cir. 1996) *("Murrelet I")*, we decided that the factual evidence presented by EPIC in support of its claim that FWS engaged in "agency action" by providing advice on how the lumber companies could avoid a "take" under § 9 of ESA was insufficient to support the issuance of a preliminary injunction because "nothing in the letter [at issue] justified an inference that [FWS] has the authority to enforce California's laws or regulations." We said that when an agency lacks the discretion to influence private action, there is no "agency action." *Id.*

In this case, CDF, not FWS, has the discretion to influence the private action at issue. *See* Cal. Pub. Res. Code § 4582.7(e); *Sierra Club v. State Board of Forestry*, 7 Cal. 4th 1215, 1220, 876 P.2d 505 (1994). As FWS stated in its November 20, 1992 concurrence letter, "our concurrence with [Appellants'] Plan does not constitute 'approval' of individual THPs. . . . Final determinations regarding satisfaction of [section 919.9(e)] . . . remain with the Board and the CDF." Thus, in this case, as in *Murrelet I*, there is no agency action.

Implicit in this decision is our rejection of EPIC's argument that the State of California can somehow "delegate" its authority to influence private action to the federal government. Submission of a letter stating that the proposed management prescription is acceptable to FWS does satisfy Rule 919.9(e) - one of the seven options for providing information to CDF so that the Director of CDF can evaluate whether or not the proposed activity will result in a "take." However, it does so as a matter of state law. While the State of California may choose to credit FWS' opinion on the question whether proposed timber

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[3] Section 9 of ESA provides that it is unlawful to "take" any endangered species of fish or wildlife within the United States or the territorial sea of the United States. 16 U.S.C. § 1538(a)(1)(B).

operations will likely result in a take of protected species, it may not, in so doing, force "agency action" onto the federal government.[4]

In sum, there is no evidence of federal discretionary involvement or control over Appellants' THPs. As a result, there is no serious question whether FWS engaged in "agency action" under § 7 of ESA.

Because we disagree with the district court's decision that EPIC raised serious questions as to whether FWS engaged in "agency action" under ESA, we necessarily also disagree with the district court's decision that EPIC raised serious questions as to whether FWS engaged in "major federal action" under NEPA. As we said in Murrelet I, "if there is any difference [between 'agency action' and 'major federal action'], case law indicates 'major federal action' is the more exclusive standard." *Murrelet I*, 83 F.3d at 1074 (citing *Sierra Club v. Babbitt*, 65 F.3d 1502, 1512 (9th Cir. 1995)).

The preliminary injunction is VACATED.

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[4] EPIC's reliance on *Ramsey v. Kantor*, 96 F.3d 434, 443 (9th Cir. 1996) ("if a federal permit is a prerequisite for a project with adverse impact on the environment, issuance of that permit does constitute major federal action"), is misplaced. Obtaining an FWS concurrence is not a prerequisite to gaining CDF approval of a THP; it is merely one of seven ways to gain CDF approval.

APPENDIX F

NOT FOR PUBLICATION

MARBLED MURRELET *(Brachyramphus marmoratus)*, NORTHERN SPOTTED OWL *(Strix occidentalis caurina)* and ENVIRONMENTAL PROTECTION INFORMATION CENTER, INC.
v.
BRUCE BABBITT, MOLLIE BEATTIE, MICHAEL SPEAR, U.S. FISH & WILDLIFE SERVICE, THE PACIFIC LUMBER COMPANY, SCOTIA PACIFIC HOLDING COMPANY and SALMON CREEK CORPORATION

No. C 95-3261-LCB

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

April 9, 1996, Filed

DISPOSITION: Plaintiffs' motion for a preliminary injunction GRANTED.

JUDGES: Louis C. Bechtle, J.

OPINION BY: Louis C. Bechtle

Presently before the court is Plaintiff is Plaintiffs' Motion for a Preliminary Injunction, which seeks to enjoin Defendants The Pacific Lumber Company, Scotia Pacific Holding Company, and Salmon Creek Corporation (together, "PL") from conducting logging activities pursuant to eight Timber Harvest Plans that have been issued by or are pending before the California Department of Forestry and Fire Protection. For the reasons set forth below, the motion will be granted.

I. BACKGROUND

Plaintiffs filed this civil action on September 15, 1995, seeking to enjoin PL from harvesting dead, dying, and diseased timber on 197,792 acres of its land in Humboldt County, California, pursuant to three Notices of Exemption approved by the California Department of Forestry and Fire Protection ("CDF"). Plaintiffs allege that certain contacts between PL and the United States Fish and Wildlife Service (the "Service") concerning logging on PL's land under the three exemption notices triggered the Service's duties under § 7 of the Endangered Species Act ("ESA") to secure a biological opinion and under the National Environmental Policy Act ("NEPA") to prepare an Environmental Impact Statement ("EIS"). Plaintiffs also allege that PL's logging activities would cause a "take" of plaintiff marbled Murrelet *(Brachyramphus marmoratus)* under ESA § 9.[1]

On September 29, 1995, United States District Judge Maxine M. Chesney enjoined PL from logging under the exemption notices. PL appealed this ruling to the United States Court of Appeals for the Ninth Circuit, which heard argument on March 14, 1996.

On or about March 7, 1996, Plaintiffs filed a Motion for Temporary Restraining Order and Preliminary Injunction, seeking to enjoin PL[2] from logging on about 1373 acres of its Humboldt County land pursuant to eight Timber Harvest Plans. ("THPs").[3] Plaintiffs allege that the Service violated § 7 of ESA and NEPA by writing two

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[1] Section 9 makes it unlawful for any person to "take" any endangered species "within the United States or the territorial sea of the United States." 16 U.S.C. § 1538(a)(1)(B).

The term "take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). The United States Supreme Court has upheld the federal regulation defining "harm" as including "significant habitat modification or degradation that actually kills or injures wildlife." *Babbitt v. Sweet Home Chapter of Communities for a Greater Or.*, ___ U.S. ___, ___, 115 S. Ct. 2407 (1995).

[2] Plaintiffs do not seek injunctive relief against Defendants Bruce Babbitt, Mollie Beattie, Michael Spear or the Service (collectively, the "Federal Defendants").

[3] There is some overlap between the areas covered by the eight THPs at issue on this case and the earlier CDF approvals of exemptions for clearing dead, dying, and diseased trees. In addition, one of the THPs in this case affects the Owl Creek area. PL has been enjoined from timber harvesting under a THP in that area by order of the undersigned, sitting by designation from the Eastern District of Pennsylvania. *Marbled Murrelet v. Pacific Lumber Co.*, 880 F. Supp. 1343 (N.D. Cal. 1995).

letters to PL, concluding that logging in accordance with PL's Spotted Owl Management Plans is not likely to result in a "take" of the Northern Spotted Owl, without first preparing a biological opinion or an EIS. On March 15, 1996, after a telephone conference with counsel, the court issued a Temporary Restraining Order enjoining PL from conducting logging operations under the eight THPs.

On March 20, 1996, the court held a hearing on the instant motion. This Memorandum constitutes the court's findings of fact and conclusions of law.

II. FINDINGS OF FACT

1. THE PARTIES

Plaintiff Environmental Protection Information Center, Inc., is a non-profit corporation based in Garberville, California, formed to promote environmental values and environmental protection. (Compl. ¶ 15.)[4] Its 300 members, some of which are Humboldt County residents, have brought a number of lawsuits concerning timber harvesting since 1980. *Id.*

Plaintiff Northern Spotted Owl *(Strix occidentalis caurina)* (also referred to as the "Owl") was listed by the Service as a threatened species under the ESA on June 26, 1990. *See* 50 C.F.R. § 17.11(h). As of January 1992, about forty percent of the known Owl pairs were found on private lands in Northern California. 57 Fed. Reg. 1976, 1801 (Jan. 15, 1992) (Final rule defining the critical habitat for the Owl). According to a state agency database, more than 1100 Owl sites are known in California counties of Del Norte, Humboldt, and Mendocino. (Detrich Decl. ¶ 17.)[5] Most of these sites are in areas in which timber management has been conducted for decades. *Id.*

Defendant The Pacific Lumber Company is a Delaware corporation with an office on Scotia, Humboldt County, California. (Answer ¶ 18.)[6] Defendants Scotia Pacific Holding Company and Salmon Creek

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[4] Citations to "Compl." Refer to Plaintiffs' Second Amended Complaint for Declaratory and Injunctive Relief, filed March 20, 1996.

[5] Citations to "Detrich Decl." Refer to the Declaration of Phillip J. Detrich, the Service's lead biologist for permitting and consultation with respect to the effects of forestry activities on listed species in California. (Detrich Decl. ¶ 2.)

[6] Citations to "Answer" refer to PL's Answer to Plaintiff's First Amended Complaint for Declaratory and Injunctive Relief.

Corporation are subsidiaries of The Pacific Lumber Company. *Id.* PL owns about 198,000 acres of land, all of which are located in Humboldt County and are zoned exclusively for timber production. *Id.* The lands include old-growth, residual (previously harvested), and second and third growth forest stands. (Herman Decl. ¶ 2.)

2. OBTAINING A THP UNDER FOREST PRACTICE RULE 919.9(E)

The Z'berg-Nejedly Forest Practice Act of 1973 ("FPA"), Cal. Pub. Res. Code §§ 4511 *et seq.*, and regulations promulgated thereunder, comprehensively regulate commercial timber operations in California. In order to harvest timber in California, a person must submit a THP prepared by a registered professional forester ("RPF"), unless an exemption applies. Cal. Pub. Res. Code § 4581. The California Board of Forestry (the "Board") reviews THPs under its Forest Practice Rules. Cal. Pub. Res. Code § 4582.75. The Board has promulgated a special rule for THPs that are in the range of the Northern Spotted Owl. *See* 14 Cal. Code Reg. § 919.9. The pertinent part of this section states as follows:

> Every proposed timber harvesting plan . . . shall follow one of the procedures required in subsections (a)-(g) below for the area within the THP boundary as shown on the THP map and also for adjacent areas as specified within this section. The submitter may choose any alternative (a)-(g) that meets the on-the-ground circumstances. The required information shall be used by the Director to evaluate whether or not the proposed activity would result in the "take" of an individual northern spotted owl.

Id. Section § 919.9(e) states:

> If the plan submitter proposes to proceed pursuant to the outcome of a discussion of the proposed THP between the plan submitter and the U.S. Fish and Wildlife Service, the plan submitter shall submit written documentation in the form of a letter prepared by the RPF that the described or proposed management prescription is acceptable to the USFWS.

14 Cal. Code Reg. § 919.9(e). A submitter proceeded under this subsection need not obtain the Service's approval for each THP. (Tr. at 46.)[7] Rather, the submitter must submit to CDF a copy of a letter stating that the "proposed management prescription is acceptable" to the Service. The submitter's "proposed management prescription," which usually is a property-wide strategy for logging without "taking" the owl, is kept on file with CDF and is incorporated by reference in each THP. (Tr. at 45.) If the submitter's management plan changes, a revised letter from the Service is required. (*See* Tr. at 56.).

After an application is submitted, CDF determines within ten days whether a preharvest inspection of the proposed logging area is necessary. 14 Cal. Code Reg. § 1037. The CDF Director has fifteen days from the initial inspection (or, if no inspection was deemed necessary, the date of filing) to review the THP and take public comments to determine whether it complies with the applicable statutes and rules. 14 Cal. Code Reg. § 1037.4. After the review and comment period, the Director must determine whether the THP complies with the FPA and the Board's Rules and Regulations. *Id.* If the THP does not comply, the Director must return the plan to the submitter with a notice informing it of a right to a hearing before the Board. 14 Cal. Code Reg. § 1037.6. Any appeal by the submitter must be filed within ten days of receipt of the returned plan. Cal. Pub. Res. Code § 4582.7(c). If the Director does not act on the THP within twenty-five days, timber operations may commence pursuant to the THP. Cal. Pub. Res. Code § 4582.7(d). If the Director determines that the THP complies with the applicable rules, "the person submitting the plan shall be notified, and timber operations thereunder may commence." 14 Cal. Code Reg. § 1037.7.

3. PL'S TIMBER OPERATIONS AND THE THPS AT ISSUE IN THIS CASE.

The Northern Spotted Owl habitat exists across PL's property. (Tr. at 75-76.) Owls on PL's lands move around from year to year. (Tr.. at 100.) The trees that comprise the eight THPs at issue contain everything from Owl Foraging to Owl nesting habitat. (Tr. at 109.)

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[7] Unless otherwise indicated, citations to "Tr." Refer to the transcript of the March 20, 1996, hearing on Plaintiff's Motion for Preliminary Injunction.

Therefore, PL's logging operations "are in the range of" the Owl, and it must comply with § 919.9.

Since November 20, 1992, all of PL's THPs have been submitted under § 919.9(e). (Herman Decl. ¶ 9.) PL has chosen to proceed exclusively under this subsection because it has determined that proceeding under subsections (a), (b), (c), (d), (f) and (g) have various drawbacks. *Id.* ¶ 10. These options result "in a piecemeal explanation and evaluation of a landowner's THP on less than a property-wide basis—unlike the *no take* management plan approach encouraged under Option (e)." *Id.* In particular, options (a), (b), and (f) require the scheduling and visits by state-designated biologists, which is a "difficult, expensive and time-consuming process" partly because there are not enough designated biologists to analyze the THPs involving the Owl's range. *Id.* ¶¶ 10-11.

PL presently has 153 THPs on "active" status. *Id.* ¶ 4 & Ex. A. All but one of these THPs were submitted in or after 1992. *Id.* PL categorizes the active THPs as follows: Seventy-two have been approved by CDF but not completed; sixty-five have been approved by CDF and completed, thirteen have been submitted and are under CDF's review, two have been approved by CDF but logging has been prohibited by court order, and one was denied by CDF. *Id.* Ex. A at 4.

The proposed operations embracing the eight THPs at issue in this case comprise 1373 acres in Humboldt County. (*See Id.* ¶ 16) (summarizing the THP areas and whether the Owl's habitat is inside the area). CDF has approved two of the THPs.[8] (Herman Supp. Decl. Ex. A col. 2.) The other six are under review by the CDF.[9] *Id.* The eight THPs permit PL to conduct logging operations in the company's old-growth Douglas-fir, and second-growth and residual old-growth redwood, forests. (Herman Decl. ¶ 16.) No Owls are known to be in the area of any of the eight THPs. (Chinnici Supp. Decl. Ex. A col. 4.) Owls are known to be within 1000 feet of four of the eight THPs areas.[10]

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[8] CDF has approved the following THPs: 1-95-474 HUM and 1-95-548 HUM. (Herman Supp. Decl. Ex. A Col. 2.)

[9] The THPs that are presently pending before the CDF are 1-95-438 HUM; 1-95-458 HUM; 1-95-566 HUM; 1-95-568 HUM; 1-95-580 HUM; and 1-96-036 HUM ("THP-036"). *Id.*

[10] The conclusions as to whether an Owl is "known" to be in the THP area or within 1000 feet of the THP area is based on PL surveys performed by PL's field crew. (Tr. at 92, 99.) The surveys performed pursuant to the Service's protocol, are designed to

(Chinnici Supp. Decl. Ex. A col. 5.) However, seven of the eight THPs state that the Owls, "including their habitat, [are] associated with the THP area." (Tr. at 75.) The exception states that "[t]here are no known Northern Spotted Owls within 1,000 feet of the THPs boundaries." (Powell Decl. ¶ 3.)

Seven of the eight THPs propose clear cutting.[11] (Herman Decl. ¶ 16.) Two of the THPs propose "commercial thinning," in which about half the trees are removed on an evenly disbursed basis to enhance the growth rate of the residual stand.[12] (Tr. at 37-38.) Five THPs permit PL to harvest timber for road rights-of-way. (Herman Decl. ¶ 16.) Four of the eight provide for rehabilitation of understocked areas. *Id.* Four permit logging for "alternative prescription watercourse protection zones," which consist of special harvesting method areas designed to retain the quality of the riparian zone for fish, wildlife and water quality protection. *Id.*

PL must conduct additional surveys to determine whether Owls are in the area of four of the eight THPs at issue in this motion. (Chinnici Sup. Decl. Ex. A col. 6.) The additional surveys are necessary because PL has not completed the surveys according to the Service's protocol. (Tr. at 99.) These surveys can be completed as early as June; PL cannot begin logging pursuant to these THPs until that time. (Tr. at 121.)

4. PL'S SPOTTED OWL MANAGEMENT PLANS

On November 16, 1992, PL prepared a Spotted Owl Management Plan (the "Owl Management Plan" or the "Plan"), which it describes as "a forest management guide insuring a no 'take' of the northern spotted owl." (Powell Decl. Ex. 2 at 1.) The Owl Management Plan, like other "no-take" plans, allows PL to consistently plan its timber operations in light of various factors, such as the types of timber needed, the

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detect the presence of Owls. *Id.* Under the protocol, PL may conduct either a one-year survey, which comprises six visits in one year, or a two-year survey, which comprises three visits in two consecutive years for a total of six visits. (TR. At 114.)

[11] Under PL.s Northern Spotted Owl Management Plan, described *infra*, PL proposes clear cutting "where the existing stand is not able to produce up to the site's capability or where site specific conditions make selective harvest impractical." (Powell Decl. Ex. 2 at 11.)

[12] This method of selective partial cutting is PL's primary method of logging. (Powell Decl. Ex. 2 at 11.)

availability of equipment and crews, and the numerous seasonal wildlife restrictions that permit harvesting to occur only in very narrow time frames. (Herman Decl. ¶ 8.) For this reason, a management plan is essential to a company like PL. *Id.*

In summary, the Owl Management Plan provides for four distinct, yet overlapping, levels of management that constitute the framework under which PL. seeks to engage in logging operations while protecting the Owl. (Chinnici Supp. Decl. ¶ 5.) Under Level 1, the Owl Management Plan provides for a "basin-wide" approach, requiring that a minimum of sixty percent of each of the eighteen major drainage basins on PL's land—or about 120,000 acres—will remain in a suitable Owl habitat at all times. *Id.* ¶ 5(a). Under Level 2, the Owl Management Plan requires that 1500 acres around every known Owl territory will be managed by PL so that at least eighty percent of the area is continuously retained in suitable Owl habitat. *Id.* ¶ 5(b). Under Level 3, the Owl Management Plan requires a 1000-foot radius circle or seventy-two total acres, to be protected around each active nest site.[13] *Id.* ¶ 5(c). No timber harvesting may occur during the Owl breeding season, from March 1 to August 31. *Id.* Under Level 4, PL must actively monitor Owl activity on and around every THP area and must commit to monitor Owl utilization of PL's lands over the long term. *Id.* ¶ 5(d).

PL believes that logging pursuant to the Owl Management Plan could improve the Owl's overall habitat on PL's lands by providing suitable habitat on the landscape level, and by conducting harvest outside of known Owl sites, which will create habitat for the Owl's primary prey, the dusky-footed woodrat. *Id.*

The THPs incorporate by reference all restrictions included in the Owl Management Plan, and such restrictions are legally binding on PL and may be enforced by CDF. (Tr. at 48-50.) PL believes that, if it were to proceed with timber harvest operations under the eight THPs at issue in this case, it will preserve the requisite area of Owl habitat as required by the four levels of its plan. (Chinnici Supp. Decl. Ex. A cols. 7-9.)

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[13] The 1000-foot radius is four times larger, in terms of total area protection, than the 500-foot radius circles mandated by 14 Cal. Code Reg. § 919.9(g)(1). (Chinnici Supp. Decl. ¶ 5(c).)

According to both PL and the Service, no instances of "take" have occurred since PL conducted THPs pursuant to the Owl Management Plan. (Chinnici Supp. Decl. ¶ 13; Detrich Decl. ¶ 18.)

5. THE SERVICE'S REVIEW OF AND CONCURRENCE WITH PL'S OWL PLANS

To assist timber companies with harvesting in compliance with § 919.9(e), the Service has reviewed the companies' Owl "no-take" plans. The first such review occurred in late 1990, after Sierra-Pacific Industries ("S-P"), California's largest timber company, approached the Service with a proposed plan designed to ensure that Owls would not be taken during the performance of THPs. (Detrich Decl. ¶ 11.) The Service viewed S-P's "No-take" plan as being sufficient to allow S-P to log under THPs in accordance with the plan and avoid the need for individual CDF review. *Id.* The Service communicated with the company, reviewed the draft plan and discussed the plan with CDF. *Id.* In April 1991, the Service wrote to S-P, concurring that logging in accordance with its "no-take" plan would not result in a take, provided that several additional protective measures would be followed. *Id.* The concurrence eventually was extended and renewed. *Id.*

In September 1992, PL approached the Service to propose the preparation of a similar no-take Plan. *Id.* ¶ 12. In reviewing PL's Owl Management Plan, Service officials conducted several field visits, participated in discussions with PL officials, and reviewed a draft. *Id.* On November 20, 1992, the Service sent to PL a letter of "Concurrence with Spotted Owl Management Plan." (Powell Decl. Ex. 1.) This letter states that the Service has reviewed the Owl Management Plan and "concurs that activities conducted on [PL] property in compliance with this Plan likely will not result in take of northern spotted owls, provided that such activities also comply with conditions specified in this response." *Id.* At 1. A copy of this concurrence letter is included with all of PL's § 919.9(e) submissions to CDF. (Tr. at 33.) PL cannot obtain approval of a THP under § 919.9(e) without the Service's concurrence letter. (Tr. at 71-72.) The Service regularly monitors PL's compliance with the Owl Management Plan by telephone calls and visits to the property. (Tr. at 59.)

On January 18, 1996, PL revised its Owl Management Plan. (Powell Decl. Ex. 4.) The Service sent PL a second "Concurrence With

Northern Spotted Owl Management Plan," stating, as the 1992 letter had, that "the Service concurs that activities conducted on [PL] property in accordance with this plan are not likely to result in take of northern spotted owls." (Powell Decl. Ex. 3.) The Service considers the Owl Management Plan in effect until January 1, 1999. *Id.*

In addition to the S-P and PL plans, the Service has concurred with similar "no take" plans for two smaller California timber companies in 1993 and 1995. (Detrich Decl. ¶ 13.) At least one other small company is considering a "no-take" plan, and at least four California timber companies are in the process of preparing habitat Conservation plans that will accompany applications for incidental take permits for Owls. *Id.* ¶¶ 13-14.

The Service has concluded that continued timber management, including selected timber harvesting, and maintenance of Owl populations are not incompatible in Northwestern California, especially if basic protective measures can be continued. (Detrich Decl. ¶ 17.)

The Service has never engaged in an internal consultation concerning the effects of the concurrence letters or the logging pursuant to PL's § 919.9(e) THPs on the Owl or the environment. The Service has never prepared a biological opinion or an EIS – as those terms are defined by federal regulations – as to the effect that logging pursuant to PL's § 919.9(e) THPs could have on the Owl or the environment.

The Service's concurrence letter to PL, which enabled it to submit its § 919.9(e) letter, was tantamount to an approval of PL's THPs under § 919.9(e) because, even though CDF retained final approval, CDF routinely allowed PL's § 919.9(e) THPs to proceed. The Service had *de facto* control over whether CDF would issue THPs under § 919.9(e).

6. PLAINTIFFS' CRITICISMS OF PL'S OWL PLANS

Plaintiffs' expert, Peter C. Carlson ("Carlson"), has alleged that the Owl Management Plan contains serious deficiencies in both its information presented and its Owl protection measures and, therefore, is inadequate to ensure that no "take" of Owls is not likely to occur from logging in accordance with the Plan. (Carlson Decl. ¶ 2.) Carlson challenged the quality and accuracy of the Plans on seven principal grounds.

First, Carlson alleges, the Owl Management Plan inadequately classifies and defines the functional Owl habitat based on timber type

maps, rather than on the biology of the Owl and on local conditions related to Owl activity. *Id.* ¶ 3. He contends that the timber type maps allow resolution down to ten-acre areas, and this scale is too broad to provide sufficient data about on-the-ground conditions to determine whether certain areas in fact constitute suitable Owl habitat, especially in roosting or nesting habitats. *Id.* Rather, the proper standard for measuring stand structure is to measure "vegetative plots centered at or around a roost, foraging, or nest location." (Carlson Supp. Decl. ¶ 2.)

Second, Carlson notes that the Owl Management Plan's conclusions about habitat usage are based partly on telemetry data that, he alleges, is inadequate to provide sufficient information from which to draw statistically valid conclusions. (Carlson Decl. ¶ 4.) The Plan states that five radioed Owls were the source of most of the telemetry data and that forty percent of such data is based on a single radioed Owl.[14] *Id.*

Third, Carlson questions the soundness of the Plan's retention of areas with less than fifty percent canopy closure as foraging and roosting habitat for Owls. (Carlson Decl. ¶ 5; Carlson Supp. Decl. ¶ 4.) Timber type maps often classify forest structure in terms of canopy closure solely on the basis of overstory canopy, because understory canopy is not always visible from the aerial photographs upon which timber type maps are partially based. (Carlson Decl. ¶ 5.) Therefore, Carlson reasons, many of the areas identified on the timber type maps having less than fifty percent canopy closure may have much higher total canopy closure, and PL's assumption that it can provide functional foraging habitat by retaining areas with less than fifty percent total canopy closure may be incorrect. *Id.* Therefore, Carlson asserts, "[t]he

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[14] The Service agrees that PL's radio-telemetry data was not extensive enough to draw statistically sound conclusions about habitat use by the owl population. (Detrich Decl. ¶ 16.) However, the Service notes that this does not justify the conclusion that a take is likely to ensue under the Plan. *Id.* Further, the Service

> fully recognized problems associated with habitat typing in our letter of concurrence with the 1992 version of the plan, and recommended a notification and review process to be used in the event that inclusion of acreage of these habitat types would be necessary to meet habitat retention goals. The 1996 version of the plan does not include this particular notification process, but the company is well aware of our concerns on this subject, and the 1996 plan's improved reporting procedures should provide both the Service and CDF better opportunity to identify those THPs where review of habitat typing may be warranted.

implications of this error could be enormous because such areas retained may not support successful owl foraging behavior." *Id.*

Fourth, Carlson contends, the Plans' assertion that the Owl prey base will remain adequate is without supporting evidence. *Id.* ¶ 8. Moreover, he asserts, the fact that the landscape contains adequate numbers of prey does not necessarily mean that the prey will be available to the Owls because Owls need adequate cover for foraging for protection from predation and adequate perch sites, among other things. *Id.*

Fifth, Carlson alleges that the Plan's conclusion that logging conducted in accordance with the Plan will not cause a "take" of Owls is based on the assumption that the entire landscape under PL's control will be managed according to the Plan. *Id.* ¶ 10. However, Carlson notes, the Plan is designed to satisfy only THPs obtained under 919.9(e) and the 1996 version permits PL to "conduct timber harvest in manners not consistent with the Plan, subject to the prohibitions of § 9 of the ESA. Activities inconsistent with the plan may not be submitted to CDF under § 919.9(e) . . . but may be submitted to CDF under other provisions of the rules." *Id.* (quoting Powell Decl. Ex. 4 at 19.) Therefore, Carlson reasons, the conclusions reached by PL and the Service "could be undermined by significant deviations from the Plan[s]." *Id.*

Sixth, Carlson notes that the Plan provides, with respect to timber harvests conducted outside THP areas, that if the harvest is proposed in suitable nesting habitat that has not been adequately surveyed and operations are to occur between May 15 and September 1, a visual inspection of the area by a biologist is necessary. *Id.* ¶ 11. Carlson suggests that, under accepted owl survey protocols, calling surveys also are required. *Id.* Further, Carlson notes that the Plan does not address who will conduct the visual inspections or how and when they will be conducted, which are important facts in assessing the reliability and validity of a visual inspection. *Id.*

Seventh, Carlson notes that data regarding the location and number of nest sites or roosting and foraging habitats were not updated in the 1996 plan. (*Id.* ¶ 12; Tr. at 106-07.)

Based on these alleged "informational inadequacies" of the Plans, Carlson believes that the Plan's statement that logging pursuant to the Plans will result in an overall improvement of Owl habitat has not been shown with any reasonable scientific certainty. (Carlson Decl. ¶ 7.)

6. EFFECT OF AN INJUNCTION ON PL

The timber operations embracing these eight THPs comprise twenty percent of PL's 1996 operations. (Herman Decl. ¶ 18.) The economic value of the operations to PL and the community is in the millions of dollars. *Id.* PL, however, could maintain its five mills running at two shifts per day—its present operating level—until June 1996 even if it could not process logs that are subject to this motion. (Tr. at 63.) Further, PL can not harvest timber pursuant to the two THPs that have been issued by CDF until June because PL. must complete Owl surveys. (Tr. at 121).

III. DISCUSSION

A. PLAINTIFFS' ESA CLAIM

1. The Statutory Framework

The ESA contains substantive and procedural provisions that are designed to protect threatened species such as the Owl. Section § 7 provides, in relevant part, that

> [e]ach Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any . . . threatened species . . . which is determined by the Secretary . . . to be critical . . . .

16 U.S.C. § 1536(a)(2).

Once discretionary "agency action" occurs that "may affect" an endangered or threatened species, the agency undertaking such action must consult, either formally or informally, with the Secretary of the Interior. 16 U.S.C. § 1536(a)(4); 50 C.F.R. § 402.14(a). The Secretary of Interior has delegated his responsibility for the Northern Spotted Owl to the Service. *See* 50 C.F.R. § 402.01(b). Therefore, in order for § 7 to have meaning in this case, the § 7 consultation would involve Service officials undertaking the action and Service personnel

possessing the expertise concerning the effect of the action on the Owl.[15]

The Service may attempt informal consultation to assist with the determination of whether formal consultation is required. 50 C.F.R. § 402.13(a). If, during informal consultation, Service officials determine that the action is not likely to adversely affect the Owl, no further consultation is necessary, and the agency action may proceed. *Id.* The Service, however, may suggest modifications to the action that may avoid the likelihood of adverse effects to the species. 50 C.F.R. § 402.13(b). If no such determination is made, formal consultation must be undertaken. *See* 50 C.F.R. § 402.14.

The Service must then prepare a biological opinion evaluating the effects of the action and stating, among other things, whether the action is likely to jeopardize continued existence of the species. 50 C.F.R. § 402.14(h). The biological opinion must be based on the best scientific evidence available. 50 C.F.R. § 402.14(d). If the biological opinion finds that jeopardy will occur, it issues a "jeopardy biological opinion," which may suggest reasonable and prudent alternatives to the proposed action that would avoid jeopardizing the species. 50 C.F.R. § 402.14(h)(3). If the Service determines that its action is not likely to jeopardize a listed species, it issues a "no jeopardy" opinion. *Id.*

2. Subject-Matter Jurisdiction

Defendants argue that Plaintiffs failed to provide the Secretary of the Interior with notice of the alleged § 7 violation prior to sixty days before commencing this civil action, as required by 16 U.S.C. § 1540(g)(2)(A). Because of this, PL argues that the court lacks subject-matter jurisdiction over Plaintiffs' § 7 claim. Defendants have presented this dispositive issue before the Ninth Circuit in the pending appeal of Judge Chesney's preliminary Injunction. The court notes that the case law suggests that Plaintiffs have failed to specifically give notice of a particular § 7 violation. *See Save The Yaak Comm. v. Block*, 840 F.2d 714, 721 (9th Cir. 1988). The difficulty presented to this court by reason of this circumstance is that this very issue, in this very civil

[15] Counsel for the Federal Defendants argued before Judge Chesney during a hearing on September 22, 1995, that the consultation requirement of § 7(a)(2) is not limited to situations involving two agencies. Counsel told the court that the Service "often consults with itself. That's called internal consultation." (Tr. 9/25/95 at 61-64.)

action, is currently under submission to the Ninth Circuit, and accordingly, for that reason, this court will defer to whatever disposition is to be made by the Ninth Circuit on that issue. Because the Ninth Circuit may conclude that there is subject-matter jurisdiction on the Plaintiffs' § 7 claim, this court will analyze Plaintiffs' claim accordingly. If the Ninth Circuit rules otherwise, then this court will make such rulings as will be necessary at that time concerning the Plaintiffs' § 7 claim.

3. Preliminary Injunctions Under the ESA

Under the traditional test for preliminary injunctions, a party is entitled to such relief if it demonstrates "(1) a likelihood of success on the merits and a possibility of irreparable injury or (2) the existence of serious questions on the merits and a balance of hardships tipping in its favor." *National Wildlife Federation v. Burlington N. R.R., Inc.*, 23 F.3d 1508, 1510 (9th Cir. 1994). The test, however, has a variation for injunctions under the ESA. *Burlington Northern,* 23 F.3d at 1510; *Sierra Club v. Marsh,* 816 F.2d 1376, 1383 (9th Cir. 1987). In such cases, the balance of hardships and the public interest tip heavily in favor of protected species as a matter of law. *Burlington Northern*, 23 F.3d at 1511; *Sierra Club*, 816 F.2d at 1383.

4. Analysis

The thrust of Plaintiffs' § 7 claim is that the Service engaged in "agency action" by furnishing the letters of concurrence with the Owl Management Plan that, Plaintiffs allege, enabled PL to satisfy § 919.9(e) and obtain the THPs at issue. This alleged "agency action" triggered the Service's duty under § 7 to consult and obtain a biological opinion. The court finds that such duties were not performed in this case. Thus, plaintiffs are entitled to a preliminary injunction if they have presented serious questions as to whether the Service engaged in "agency action" under § 7.

a. Agency Action

Federal regulations define "action" as

> all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies . . . . Examples include, but are not limited to:
>
> (a) actions intended to conserve listed species or their habitat;
>
> (b) the promulgation of regulations;
>
> (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or
>
> (d) actions directly or indirectly causing modifications to the land, water, or air.

50 C.F.R. § 402.02. The Ninth Circuit has stated that "there is little doubt that Congress intended to enact a broad definition of agency action in the ESA" and that the Supreme Court has broadly interpreted the meaning of this term. *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1054-55 (9th Cir. 1994), *cert., denied*, 115 S. Ct. 1793 (1995) (citing *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 173, 194 (1978)); *See Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, ___ U.S. ___, ___, 115 S. Ct. 2407, 2415 (1995) ("Section 7 imposes a broad, affirmative duty to avoid adverse habitat modifications . . . .").

The court finds that the Service's concurrence letter to PL was tantamount to an approval of PL's THPs under § 919.9(e). Given this finding, the court believes that Plaintiffs have raised serious questions as to whether "agency action" occurred under § 7. The service's *de facto* approval of PL's THPs appears to qualify as an "action" because it fits within three categories of the definition as set forth in 50 C.F.R. § 402.02. First, the concurrence letters were intended to conserve listed species or their habitat. Second, the letters constituted the only means under § 919.9(e) to be granted a license or permit. Third, the letters directly or indirectly will cause modifications to the land.

A review of the relevant case law reveals that no court has considered the facts of our case as part of a § 7 analysis. While no cases are squarely on point, a Ninth Circuit decision issued last year warrants discussion. In *Sierra Club v. Babbitt*, 65 F.3d 1502 (9th Cir. 1995), the Federal Bureau of Land Management ("BLM"), pursuant to statutory authority, in 1962 entered into a reciprocal right-of-way agreement with a private logging company, permitting the company to use certain logging roads and build new roads over BLM land to access its property. *Id.* At 1505. The ESA had not been enacted at this time. *Id.*

The agreement required the company to submit to BLM a map of the project for approval. *Id.* If, within thirty days of submission of the map, BLM did not notify the company that the road's location (1) was not the most direct; (2) would interfere with a BLM facility, or (3) would cause excessive erosion, the project was deemed to be approved and the proposed road could be built. *Id.*

In 1989, the logging company assigned its rights under the agreement to Seneca Sawmill Co. ("Seneca"). *Id.* at 1506. BLM and Seneca entered into a stipulation under which Seneca agreed to comply with state and federal environmental laws and standards, the violation of which empowered BLM to terminate construction if a violation was found. *Id.* In 1990, a BLM biologist prepared an environmental assessment, concluded that the action "may affect" the Northern Spotted Owl, and suggested that BLM initiate consultation with the Service pursuant to § 7. *Id.* The biologist apparently concluded that the threat to the Owl was the anticipated logging of the accessed private forestland, not the proposed road construction. *Id.* In 1991, however, the Secretary of Interior's Regional Solicitor opined that a § 7(a)(2) consultation would "serve little purpose" because BLM's control over construction was not material to the welfare of the Northern Spotted Owl. *Id.* In 1991, Seneca began building the road. *Id.* at 1507. During construction, the Sierra Club alleged that BLM violated § 7 by failing to consult with the Service regarding the effects of building the road on the Owl and its critical habitat. *Id.*

The court held, under the "narrow circumstances" of the case, that § 7 did not apply to BLM's action because of the concurrence of two factors: (1) the agreement was finalized before the ESA was enacted and (2) the "federal agency currently lacks the discretion to influence the private activity for the benefit of the protected species." *Id.* at 1511-12. Critical to the holding, therefore, was the fact that BLM's remaining power over the road on federal land was "unrelated to the conservation of the threatened spotted owl" on the private land to which the road allowed access. *Id.* at 1508 (footnote omitted).

In this case, the Service's concurrence letters to PL occurred after the ESA was enacted. In addition, the Service's concurrence letters were tantamount to an approval of PL THPs under § 919.9(e). Thus, while it may not have realized it, the Service exercised considerable—and possibly the primary—influence over whether logging on lands inhabited by the Owl would occur. Without the letters of concurrence

with PL's plans, PL's THP applications under § 919.9(e) never reach a CDF desk. The record reflects that CDF has routinely allowed 152 of PL's 153 THPs covered by the Service's required "no take" letters to proceed. The evidence also reflects that Owls nest, roost and forage on PL lands very close to the THP area at issue and that there are serious questions as to whether PL's logging "may affect" the continued existence of this threatened species. PL likely could have sought approval from CDF of its THPs under some of the other subsections, but it has not done so over the past three and a half years for the reasons set forth in the testimony of Thomas M. Herman, Resource Manager of The Pacific Lumber Company. Therefore, the Service's letters of concurrence with PL's plans, in a practical sense, raise serious questions as to whether its letters constitute "agency action" under § 7.

Because the Service in this case possesses significantly more influence over PL's lumber operations in Owl habitat than BLM's "limited" level of control (approval of an access road outside the species' habitat) over Seneca's activity in *Sierra Club v. Babbitt*, this is not a case where "the federal agency lacks the discretion to influence the private action" and "consultation would be a meaningless exercise." *Id.* at 1509. Indeed, the exercise of the agency's discretion is both a necessary and exclusive influence on the private action under § 919.9(e). In this case, by preparing a biological opinion of the affected area before clearing the way for PL to perform its THPs, the Service clearly possesses "the ability to implement measures that inure to the benefit of the protected species." *Id.* (footnote omitted).

b. Balance of Hardships

In ESA cases, the balance of hardships and the public interest tip heavily in favor of protected species as a matter of law. *Sierra Club v. Marsh*, 816 F.2d 1376, 1383 (9th Cir. 1987). PL, however, takes the position that "even if you had agency action authorizing something[,] Section 7 doesn't apply because [the agency action] didn't threaten to jeopardize this species' existence." (Tr. at 153.) Thus, PL asserts that a "jeopardy" finding is a prerequisite to the duty to consult and secure a biological opinion, and that this court cannot issue an injunction without a finding that "implementation of the THP(s) will threaten the continued existence of the [Owl] or at least kill a[n Owl]." (PL's Supp. Br. Opp. Prelim. Inj. at 10.) PL has not directed the court to a case that

states this proposition. The court's review of the case law convinces it that PL's position is incorrect because it is based upon a misreading of § 7.

First, the section's plain language requires federal agencies engaging in "agency action" to consult with other agencies to *"insure"* that the action will not jeopardize the continued existence of the species. Here, the jeopardy determination is to come *after* the consultation, not as part of an agency decision whether to consult, or as a precondition to a determination as to whether a biological opinion is required.

Second, the harm in a § 7 case alleging a procedural violation of the ESA is the occurrence of "agency action" without procedural steps taken to ensure that such action "is not likely to jeopardize the continued existence of" a protected species. The performance of agency action without the knowledge of its environmental consequences on a threatened species is the harm that § 7 was intended to prevent. The fact that an Owl may or may not be harmed is not relevant in the analysis at this time. Section 9 claims, on the other hand, focus on whether a person has "taken" a protected species and involve the sole question of whether an individual member of a protected species has been "taken."

Third, Plaintiffs need not show harm to an Owl to obtain preliminary injunctive relief because the relief to be awarded in a § 7 case is a court order requiring the Service to secure a biological opinion. This assessment will determine whether a particular Owl will be harmed by the agency action. The court is not an expert in wildlife biology and can not make that determination based on the present record. It may very well be that, after the Service's consultation process, the results will be a "no jeopardy finding" and the issuance of a favorable § 919.9(e) letter to PL for submission to CDF on all or some of the eight THPs.

Fourth, requiring Plaintiffs to show harm to an Owl in this case is a near-impossible task. The logging activities sought to be enjoined are on PL's private property. Plaintiffs are forced to rely on PL's survey data and other information, often sparse, that is available from state and federal wildlife agencies. Congress requires federal agencies to consult with the Service and to ensure that their actions will not adversely affect the Owl, a duty that was not performed in this case. In this case, Plaintiffs have presented serious questions arising form credible

evidence that PL's Plans may be fundamentally flawed and that logging pursuant to the eight THPs could harm the Owl and its habitat. This court believes that such a showing of harm—even if such a showing is required—is more than sufficient to warrant injunctive relief under § 7 under the facts of this case.

5. Injunctive Relief Against PL

PL argues that it cannot be enjoined unless the Service is enjoined and CDF is a party to this suit. (PL's Supp. Br. Opp. Prelim. Inj. at 8.) PL notes that the ESA authorizes suit only against parties who violate the statute. 16 U.S.C. § 1540(g)(1)(A). Plaintiffs, however, seek solely to enjoin PL from logging under the eight THPs at issue in this case, based on the Services's alleged violation of § 7. The court would enjoin the Service *and* PL if the Service had planned to issue its concurrence letters but had not yet done so. Enjoining the Service here, however, would serve no purpose because it already has engaged in the agency action. Similarly, the court need not join CDF as an indispensable party (assuming that CDF is amenable to suit in a federal court) because CDF already has approved the THPs. The only action that threatens Plaintiffs with future injury is PL's planned timber harvesting pursuant to the eight THPs at issue in this case, and the court has the equitable power of awarding injunctive relief against PL under Federal Rule of Civil Procedure 65.

6. Summary

The court agrees with PL and the Service that the § 919.9(e) approach—i.e., the creation of a "blanket" concurrence letter from the Service to cover successive THPs that are submitted over time—is an efficient and reliable method of allowing PL to log on its lands and protect the Owl. Requiring PL to secure a separate concurrence letter from the Service as required by CDF under Section 919.9(e) for each THP application would be time consuming, unnecessarily expensive, and likely to result in inconsistent features in the separate approvals merely because of their individualized evaluations over time. The 919.9(e) method appears to be a good idea because it enables CDF and the Service to cooperate on environmental matters that are of mutual concern. The process also permits CDF to feel protected with the

Service's conclusion that "no take" will likely occur if the submitter's Plan on file is followed.

The court is not suggesting that the evidence shows anything improper with this practice as it is now understood, or that it is a shortcut to avoid full compliance with environmental requirements. To the contrary, the process appears to prevent duplication of scarce state and federal efforts in an area in which they have common goals, as well as a savings of time and money for the THP submitter. The § 919.9(e) method also fosters communication and cooperation among the state and federal agencies, and among citizens who are either interested in conforming to the laws or entitled to have them obeyed. The principal weakness with the § 919.9(e) procedure, however, is that its heavy reliance on the Service's concurrence letters presents a serious question concerning the reach of the Federal Defendants' obligations under § 7.

B. PLAINTIFFS' NEPA CLAIM

1. The Statutory Framework

NEPA "is our basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). The statute is intended to ensure that high quality, accurate information is available to public officials before they take action and that public officials and citizens understand the environmental effects of such action. 40 C.F.R. § 1500.1(b), (c). NEPA imposes only procedural requirements and does not dictate a substantive environmental result. *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1355-56 (9th Cir. 1994).

The relevant section of NEPA requires federal agencies to "include in every recommendation or report on . . . major Federal actions significantly affecting the quality of the human environment," an EIS and other information discussing adverse environmental effects and alternatives to the proposed action. 42 U.S.C. § 4332(2)(C).

To determine whether an EIS is necessary, the agency—in this case, the Service—first prepares an environmental assessment, which briefly describes the need for, alternatives to, and environmental impacts of, the proposed federal action. 40 C.F.R. § 1508.9. If the Service determines in the environmental assessment that the federal action will not significantly affect the environment, it may prepare a finding of no significant impact and then execute its action. 40 C.F.R. § 1508.13. If, however, the Service finds that the proposed action will

significantly affect the environment, it prepares an EIS, which addresses in detail the purpose and need for the action, the environmental impact of the action, and alternatives to the action. 40 C.F.R. § 1502.10. An EIS is a concise statement designed to alert agencies and the public to potential adverse consequences to the land, sea, or air. *Douglas County v. Babbitt,* 48 F.3d 1495, 1498 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 698 (1996). The EIS must contain statements considering alternatives, a full and fair discussion of significant environmental impacts, a discussion on mitigation measures and an evaluation of cumulative impacts. *Sierra Club v. Penfold*, 857 F.2d 1307, 1312 (9th Cir. 1988).

2. Injunctive Relief Under NEPA

The Service's position is that it has not engaged in "major Federal action" requiring compliance with NEPA. The court notes that (1) the Service has engaged in the review of California timber companies' "no-take" plans for more than five years and (2) has taken the position that it "does not regard its technical assistance, review, and concurrence with the PL NSO Plan as a major Federal action requiring concurrence with NEPA." (Detrich Decl. ¶ 20.) This position is not a tentative one, and the court believes that the Service has "completed its decisionmaking process" and that its conclusion already has "directly affect[ed] the parties." *See Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992). Therefore, the court concludes that the Service has addressed the issue and made a final decision that its activities did not bring it within NEPA.

The court reads Count II of the Second Amended Complaint as challenging this agency decision under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. The APA enables persons "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute" to seek judicial review of such action. 5 U.S.C. § 702. The APA provides for judicial review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. A court may set aside agency action if it fails to comply with any of six specified standards. *See* 5 U.S.C. § 706.

The United States Supreme Court and the Ninth Circuit have distinguished between challenges to an agency's decision not to prepare

an EIS that are based on factual determinations, the resolution of which implicates substantial agency expertise, and such decisions that turn on the meaning of a particular legal term, such as "significant." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989); *Alaska Wilderness Recreation and Tourism Ass'n v. Morrison*, 67 F.3d 723, 727 (9th Cir. 1995); *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1331 (9th Cir. 1992). Challenges based on purely factual determinations must be challenged as agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Challenges based on legal determinations must proceed as a challenge to agency action that is "without observance of procedure required by law." 5 U.S.C. § 706(2)(D). Such claims are governed by the "reasonableness" standard. *Alaska Wilderness*, 67 F.3d at 727. The difference between the two standards, however, is "not of great pragmatic significance." *Oregon Natural*, 490 U.S. at 377 n.23 (citing Court of Appeals cases discussing the similarities between the two standards).

The court must apply the "reasonableness" standard to the Service's final agency decision in this case because its determination that it did not engage in "major Federal action" is predominantly a legal one. Under this objective standard, "[t]he reviewing court [must] not substitute its judgment for that of the agency concerning the wisdom or prudence of a proposed action." *Oregon Environmental Council v. Kunzman*, 817 F.2d 484, 492 (9th Cir. 1987).

An injunction is the proper remedy for a violation of NEPA's procedural requirements "absent unusual circumstances." *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985). Plaintiffs are entitled to a preliminary injunction if they demonstrate (1) a likelihood of success on the merits and a possibility of irreparable injury or (2) the existence of serious questions on the merits and a balance of hardships tipping in their favor. *See Miller v. California Pac. Medical Ctr.*, 19 F.3d 449, 456 (9th Cir. 1994). "The court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 548, 542 (1987). An injunction will not automatically issue if a court finds a NEPA violation, *Forest Conservation Council v. United States Forest Serv.*, 66 F.3d 1489, 1496 (9th Cir. 1995), but the balance usually tips towards the issuance

of an injunction if environmental injury is "sufficiently likely." *Amoco*, 480 U.S. at 545.

Therefore, this court first must determine whether Plaintiffs have presented serious questions going to the merits of whether the Service reasonably declined to conduct an EIS because it believed its activity did not amount to "major Federal action."

Federal regulations define "major Federal action" as including

> actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly . . . .
>
> (a) Actions include new and continuing activities, including projects and programs entirely or partly . . . assisted, conducted, regulated, or approved by federal agencies . . . .
>
> (b) Federal actions tend to fall within one of the following categories:
>
> (4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decisions as well as federal and federally assisted activities.

40 C.F.R. § 1508.18.

Here, Plaintiffs contend that the discretionary action of the Service in its furnishing to PL of the concurrence letters was major federal action because it enabled PL to obtain CDF approval of its THPs under § 919.9(e). Therefore, Plaintiffs argue, the court must enjoin PL's logging activities pursuant to the THPs because the Service failed to conduct an EIS before issuing its concurrence letters.

Based on the evidence before the court at this time, the court is unable to conclude that the Service's decision that its concurrence letters were not "major Federal action" was reasonable. In fact, the court has no evidence as to what factors the Service considered or what its understanding of this fact-specific area of the law was. the regulations state that "major Federal action" includes "activities . . . partly . . . approved by federal agencies." 40 C.F.R. § 1508.18. Given the court's findings, the court cannot conclude that the Service's legal determination was reasonable. Therefore, Plaintiffs have demonstrated serious questions as to whether the Service's decision to forgo an EIS was a reasonable one.

3. Balancing of Harms

a. Harm to the Environment

Plaintiffs' affidavits demonstrate that PL's logging pursuant to the eight THPs at issue could severely harm the Northern Spotted Owl's Habitat. A fair reading of the Declaration of Peter C. Carlson is that PL's Spotted Owl Management Plan, which was designed to ensure that PL's logging would not cause a "take" of the Owl, was the product of flawed data and incorrect assumptions. PL's expert disagreed with this conclusion, but did not directly respond to all of Carlson's criticisms. The record thus demonstrates that THPs obtained by PL, which contain PL's Spotted Owl Management Plan, *could* actually cause a "take" of the Northern Spotted Owl, an injury to a threatened species that would be irreparable. Seven of the eight THPs at issue state that the Owl's habitat is associated with the THP area.

The court also notes that Plaintiffs, as a remedy for the alleged NEPA violation, have requested the court to order the Service to conduct an EIS before permitting PL to log pursuant to the THPs. The fact that Plaintiffs are presently unable to prove with certainty that a particular number of Owls will be harmed as a result of a particular THP is, at least in part, the product of the Service failure to conduct the statement before issuing the concurrence letter to PL. Because the court must balance the harms to the parties in deciding whether to grant injunctive relief, the fact that Plaintiffs have not submitted proof that establishes that a particular Owl will be harmed should not weigh against them. *See Portland Audubon Soc'y v. Lujan*, 795 F. Supp. 1489, 1509 (D. Or. 1992), *aff'd*, 998 F.2d 705 (9th Cir. 1993).

b. Harm to PL

On the other side of the scale, PL asserts that the eight THPs constitute about twenty percent of its 1996 timber volume and that, if the court enjoined PL from logging pursuant to these plans, it would temporarily suffer a loss of millions of dollars.[16] However, PL will not be able to commence logging on the two THPs approved by CDF until June because it must conduct additional Owl surveys.

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[16] The court disagrees with PL's counsel's assertion that granting this motion would "shut this company down." (Tr. at 154.)

c. Balancing of Harms

The court notes that both parties have asserted substantial harms. Plaintiffs, however, have proven that irreparable injury to the Owl, which the Service has listed as a threatened species, is sufficiently likely. A fair reading of Mr. Carlson's declaration is that PL's Owl Management Plan is fundamentally deficient in several significant respects and that its conclusions consequently are suspect. This court expects that a trial in this matter will be scheduled promptly in order to minimize the harm to PL's timber operations. At this preliminary stage in the litigation, this evidence, coupled with the irreparable damage to a threatened species, should this evidence be correct, outweighs PL's evidence regarding the monetary impact to PL.

IV. CONCLUSIONS OF LAW

The court has personal jurisdiction over the parties. The court has subject-matter jurisdiction pursuant to 16 U.S.C. §§ 1540(c) and 28 U.S.C. §§ 1331, 1361, and 2201-02. Venue in this judicial district is proper pursuant to 16 U.S.C. § 1540(g)(3)(A).

Plaintiffs have proven by a preponderance of the evidence (1) the existence of serious questions on the merits as to whether the Service violated § 7 of the ESA by issuing the letters of concurrence to PL before engaging in consultation and preparing a biological opinion and (2) that the balance of hardships tips heavily in Plaintiffs' favor.

Plaintiffs have proven by a preponderance of the evidence (1) the existence of serious questions on the merits as to whether the Service reasonably concluded that its issuance of letters of concurrence to PL was not "major Federal action" under NEPA and (2) that the balance of hardships tips in Plaintiffs' favor.

For the reasons set forth above, the court will grant Plaintiffs' Motion for Preliminary Injunction.

An appropriate Order follows.

ORDER

AND NOW, TO WIT, this 3rd day of April, 1996, upon consideration of Plaintiffs' Motion for a Preliminary Injunction, and

Defendants' opposition thereto, IT IS ORDERED that said motion is GRANTED.

Defendants The Pacific Lumber Company, Scotia Pacific Holding Company, and Salmon Creek Corporation are hereby enjoined from conducting or allowing any timber harvesting activities of any kind within the boundaries of the following Timber Harvest Plans: 1-95-474 HUM; 1-95-548 HUM; 1-95-568 HUM; 1-95-580 HUM; 1-95-566 HUM; 1-95-438 HUM; 1-95-458 HUM and 1-96-036 HUM, to the extent that these Timber Harvest Plans were obtained pursuant to 14 Cal. Code Reg. § 919.9(e).

Plaintiffs shall forthwith post a bond in the amount of $1,000.00 with the Clerk of the Court.

APPENDIX G

MARBLED MURRELET *(Brachyramphus marmoratus)*; NORTHERN SPOTTED OWL *(Strix occidentalis caurina)*; ENVIRONMENTAL PROTECTION INFORMATION CENTER,

v.

BRUCE BABBITT, Secretary, U.S. Department of Interior; MOLLIE BEATTIE, Director, United States Fish and Wildlife Service; MICHAEL SPEAR, Director, Region 1, United States Fish & Wildlife Service; UNITED STATES FISH & WILDLIFE SERVICE, Defendants, and PACIFIC LUMBER COMPANY, a Delaware Corporation; SCOTIA PACIFIC HOLDING COMPANY, a Delaware Corporation; SALMON CREEK CORPORATION, a Delaware Corporation,

No. 95-16945

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

83 F.3d 1068; 1996 U.S. App. LEXIS 10420; 42 ERC (BNA) 1667; 96 Cal. Daily Op. Service 3208; 96 Daily Journal DAR 5295; 26 ELR 20992

March 14, 1996, Argued, Submitted, San Francisco, California

May 7, 1996, Filed

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of California. D.C. No. CV-95-003261-MMC. Maxine M. Chesney, District Judge, Presiding.

DISPOSITION: REVERSED and REMANDED.

COUNSEL: Jared G. Carter, Behnke & Oglesby, Ukiah, California and David S. Winton, Pillsbury Madison & Sutro, San Francisco, California, for the defendants-appellants.

Thomas N. Lippe, San Francisco, California, for the plaintiffs-appellees.

James C. Kilbourne and Edward J. Shawaker, Appellate Section, United States Department of Justice, Washington D.C., for the defendants-amici.

JUDGES: Before: David R. Thompson and A. Wallace Tashima, Circuit Judges, and Stephen V. Wilson, * District Judge.

** Honorable Stephen V. Wilson, District Judge for the Central District of California, sitting by designation.*

OPINION BY: David R. Thompson, J.

The appellants are private corporations engaged in the lumber business. We refer to them collectively as "the Lumber Companies." They wanted to cut and remove dead, dying and decayed trees in California. The United States Fish & Wildlife Service (USFWS) consulted with them and provided them with information as to what they would have to do to avoid a "take" of endangered species under the Endangered Species Act (ESA).

In an effort to stop the intended tree cutting and removal, the plaintiffs filed an action for declaratory relief. They contended that the USFWS had gone beyond providing advice to the Lumber Companies, had assumed authority and control over the intended salvage operation, and as a result had engaged in federal "agency action." Federal agencies engaging in "agency action" are required by section 7 of the ESA, 16 U.S.C. § 1536, to undertake certain procedures, including preparation of a biological assessment and a biological opinion. The USFWS did not do this.

The plaintiffs applied for a preliminary injunction, and the district court granted it. The court determined that the balance of hardships tipped sharply in favor of the plaintiffs and that serious questions existed as to whether the USFWS had engaged in "agency action" which triggered the requirements of section 7 of the ESA. The district court also determined that serious questions existed as to whether the USFWS had engaged in a "major federal action" under the National

Environmental Policy Act (NEPA), 42 U.S.C. § 4321, et seq. This Act also requires procedures the USFWS did not undertake, including the preparation of an Environmental Assessment or an Environmental Impact Statement.

The Lumber Companies have appealed the district court's grant of the preliminary injunction.[1] We have jurisdiction under 28 U.S.C. § 1292(a)(1), and we reverse. We hold that because the USFWS did nothing more than provide consultation and information under its power to enforce section 9 of the ESA, 16 U.S.C. § 1538, et seq., there is no evidence of federal discretionary involvement or control over the Lumber Companies' proposed tree harvest. As a result, there is no serious question whether the federal defendants engaged in "agency action" under section 7 of the ESA or in a "major federal action" under NEPA. Without the predicate of a "serious question," there is no legal basis for the preliminary injunction issued by the district court.

I. BACKGROUND

A. PARTIES

The plaintiffs are the Environmental Protection Information Center, the Marbled Murrelet, and the Northern Spotted Owl (collectively EPIC). They filed suit for declaratory and injunctive relief against the federal defendants, Bruce Babbitt, Secretary of the United States Department of Interior, Mollie Beattie, Director of the United States Fish & Wildlife Service, Michael Spear, Director, Region 1, United States Fish & Wildlife Service, and against the USFWS; they also sued the Lumber Companies.

Although there are no state parties in this litigation, the California Department of Forestry and Fire Protection (CDF) was involved in the intended tree salvage pursuant to California's Z'berg-Nejedly Forest Practice Act (FPA). This Act generally requires that before commencing any timber operations in California, a Timber Harvest Plan (THP) must be submitted and approved by the CDF. Cal. Pub. Res. Code §§ 4581-4582.75. Exemptions from these state requirements

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[1] The federal defendants have not appealed because injunctive relief was not entered against them. They have, however, filed an amici curiae brief, arguing that the advice they gave the Lumber Companies did not amount to "agency action" or a "major federal action" which triggered federal obligations under the ESA or NEPA.

may be obtained. *Id.* § 4584. One of these exemptions is for the cutting and removal of "dead, dying and diseased trees" which amount to less than ten percent of the average volume per acre, subject to certain conditions. *Id.* § 4584(c); Cal. Code Regs. tit. 14, § 1038(b). This exemption, however, does not permit tree cutting or removal in key habitat areas of rare, endangered, or threatened species, or within the buffer zone of such areas. Cal. Code Regs. tit. 14, § 1038(b)(3), (7), & (8).

To obtain a permit to harvest dead, dying and diseased trees, a notice of such proposed timber operation must be submitted to the CDF. Cal. Code Regs. tit. 14, § 1038.1. Within ten days of receipt of the notice, the CDF must determine whether the notice is "complete and accurate." Cal. Code Regs. tit. 14, § 1038(e). If it is complete and accurate, the CDF sends a notice of acceptance to the submitter. *Id.* If not, the CDF returns the notice to the submitter. *Id.* If the CDF fails to act within ten days of receipt of the notice, the timber operations may commence. *Id.*

B. FACTS

In the fall of 1994, the Lumber Companies submitted and the CDF accepted two notices of proposed timber operations to salvage dead, dying and diseased trees on two parcels of the Lumber Companies' land. One parcel covered 179,103 acres, the other 12,695 acres. Both parcels are in Humboldt County in Northern California. A few months later, the Lumber Companies submitted, but the CDF did not accept, a similar notice of proposed timber salvage for another 5,994 acre parcel in Humboldt County including Headwaters Forest. Headwaters Forest is a previously unentered, 3,000-acre old-growth redwood stand. In a letter accompanying this notice, the Lumber Companies noted that some of the area might be important to threatened or endangered wildlife.

The CDF returned the notice on March 6, 1995, asking the Lumber Companies to provide the location and habitat of any rare, endangered, or threatened species. Two days later, the Lumber Companies resubmitted the notice, with five additional pages of information designating particular areas as possibly important to protected species.

On March 15, 1995, the CDF accepted the Lumber Companies' resubmitted notice. The CDF's acceptance reiterated and clarified the

conditions that the Lumber Companies consult with and inform the California Department of Fish and Game (CDFG) and the USFWS before commencing timber operations. Two days later, the CDF again wrote to the Lumber Companies requiring an on-site inspection "whereby the agencies must approve the cutting of any standing trees." On March 24, 1995, the Lumber Companies wrote to the CDF disputing several conditions imposed by the CDF.

Four days later, a reserve manager of one of the Lumber Companies met with representatives of the USFWS and the state CDFG. Following this meeting, the USFWS and the CDFG sent a joint letter to the Lumber Companies dated April 12, 1995. This letter reviewed the meeting and the on-site inspections and laid down several specific conditions that had to be met to comply with Cal. Code Regs. tit. 14, § 1038(b)(7) and with other state rules, and to avoid a 'take' of identified species under the federal ESA.

On May 3, the Lumber Companies responded to the April 12 letter seeking clarification of conditions. Finding the conditions too restrictive, the Lumber Companies stated they were considering filing an action against the United States and California for inverse condemnation.

The USFWS and the state CDF provided the requested clarification by letter dated July 18, 1995. On September 1, 1995, the Lumber Companies notified the CDF, CDFG, and USFWS that they would fully comply with all conditions laid out in the past communications. They stated they intended to commence cutting and removing dead, dying and diseased trees in the Headwaters Forest sometime shortly after September 15, 1995. On September 15, 1995, EPIC filed its complaint.

C. PROCEDURAL HISTORY

In the complaint, EPIC alleged that the USFWS had exercised discretionary federal control over the Lumber Companies' timber operations, thereby triggering the USFWS's duty under section 7 of the ESA to prepare a biological assessment and a biological opinion. EPIC also alleged that the USFWS had engaged in "major federal action" within the meaning of NEPA, requiring the preparation of an environmental impact statement. EPIC sought to enjoin the Lumber Companies from salvaging the trees and to enjoin the Secretary of the

Interior and the USFWS from approving any cutting or removal pursuant to the exemption notices without first preparing a biological assessment and opinion, and an Environmental Impact Statement (EIS). On September 29, 1995, the district court entered a preliminary injunction against the Lumber Companies, but not against the federal defendants. This appeal followed.[2]

EPIC filed a motion requesting us to take judicial notice of a USFWS memorandum dated May 8, 1995, but not submitted to the district court. The document is not part of the record in this case, and we deny the motion to take judicial notice of it.

II. DISCUSSION

The core issue is whether evidence was presented to the district court which indicated discretionary federal involvement or control over the Lumber Companies' intended tree salvage operations sufficient to raise a serious question whether the USFWS engaged in "agency action" under the ESA or a "major federal action" under NEPA.

Before we reach this issue, however, we must address the Lumber Companies' jurisdictional argument that EPIC's intent-to-sue letter was inadequate under 16 U.S.C. § 1540(g)(2)(A)(i).[3] This statute requires that before a citizen may commence an action under the ESA, the citizen must give the alleged violators and the Secretary of the Interior at least 60 days advance notice of intent to sue. This requirement is jurisdictional. *Save the Yaak Comm. v. Block,* 840 F.2d 714, 721 (9th Cir. 1988). The purpose of this notice is to give the federal government and any alleged violators an opportunity to comply, and thus render a citizen suit unnecessary. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.,* 484 U.S. 49, 60, 98 L. Ed. 2d 306, 108 S. Ct. 376

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[2] The federal defendants filed a motion during this appeal for permission to file an addendum to their amici curiae brief. The addendum is a copy of a declaration filed in the district court, but not included in the excerpt of record. The document is part of the record in this case. The motion is granted.

[3] Section 1540(g)(2)(A) provides:

> No action may be commenced under [the citizen suit provision] -
>
> (i) prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator of any such provision or regulation.

(1987) (Clean Water Act); *Maine Audubon Soc'y v. Purslow*, 672 F. Supp. 528, 529-30 (D. Me. 1987) (ESA).

On March 21, 1995, EPIC sent the Lumber Companies and the federal defendants a letter captioned "Sixty Day Notice of Violations under Federal Endangered Species Act and Intent to File Suit Pursuant to 16 U.S.C. § 1540(g)." The Lumber Companies contend this letter failed to give adequate notice because it contemplated suit for a violation of section 9 of the ESA rather than a violation of section 7, the section of the ESA relied upon by EPIC in its complaint. We disagree.

The five-page letter describes the activity which EPIC believed violated section 9. Section 7 was referred to in only one part of the letter. This part stated:

> The ESA also prohibits federal actions which "will likely affect" a listed species unless full consultation with the Interior Secretary's delegate respecting such effects has occurred and the federal agency has "insured that [its] action . . . is not likely to jeopardize the continued existence of any [such] species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical . . . ." 16 U.S.C. § 1536(a)(2).

(Emendations in original). Section 1536(a)(2), mentioned in the letter, is part of section 7 of the ESA.

In EPIC's notice letter, it refers to section 7 and section 9. The section 7 prohibition stated in the part of the letter quoted above does not limit the scope of the letter to a notice of suit only under section 7; nor does reference to the section 9 prohibition limit the scope of the letter to a notice of suit only under section 9. The letter clearly gives notice of an intent to sue under the ESA. Although section 7 was referenced in only one part of the letter, the letter as a whole provided notice sufficient to afford the opportunity to rectify the asserted ESA violations. This was sufficient to satisfy the jurisdictional requirement of notice under 16 U.S.C. § 1540(g)(2)(A)(i). The district court had subject matter jurisdiction, and we turn now to the merits of the appeal.

In this circuit, the test for granting a preliminary injunction is whether a party has demonstrated: (1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) sufficiently serious questions going to the merits to make them a fair ground for

litigation, and the balance of hardships tips sharply in favor of the party seeking relief. *Sierra Club v. Marsh,* 816 F.2d 1376, 1382 (9th Cir. 1987). The district court relied on the second part of this test in issuing its preliminary injunction.

Congress has determined that under the ESA the balance of hardships always tips sharply in favor of endangered or threatened species. *Id.* at 1383. EPIC, therefore, was entitled to a preliminary injunction if it demonstrated "sufficiently serious questions going to the merits to make them a fair ground for litigation." *Id.* at 1382.

"The merits" issue in this case is whether the USFWS engaged in "agency action" under section 7 of the ESA or a "major federal action" under NEPA. If there is a serious question of this, the district court did not err in granting the preliminary injunction; otherwise, it d*id.*

"Agency action" is defined in section 7(a)(2) as "any action authorized, funded, or carried out by" a federal agency. 16 U.S.C. § 1536(a)(2). Section 7 applies to all actions in which there is "discretionary Federal involvement or control." 50 C.F.R. § 402.03.

Following the Supreme Court's lead in *TVA v. Hill,* 437 U.S. 153, 57 L. Ed. 2d 117, 98 S. Ct. 2279 (1978), we have construed "agency action" broadly. *Pacific Rivers Council v. Thomas,* 30 F.3d 1050, 1055 (9th Cir. 1994), cert. denied, 131 L. Ed. 2d 721, 115 S. Ct. 1793 (1995). An action is an "agency action" if there is "discretionary Federal involvement or control." *Sierra Club v. Babbitt, Seneca,* 65 F.3d 1502, 1509 (9th Cir. 1995) (citing 50 C.F.R. §§ 402.03 & 402.16).

EPIC argues the USFWS exercised discretionary control over the Lumber Companies' proposed harvesting operations. Its theory is that the state's CDF originally had discretionary control over the Lumber Companies' intended salvage operations, and delegated this power to the USFWS. We do not consider this argument because we conclude that with or without such a delegation there was no discretionary federal involvement or control over the Lumber Companies' proposed salvage operations, and thus no "federal action" under section 7 of the ESA.

Referring to the letters dated March 15, March 17, and April 12, 1995, the district court determined that EPIC had presented evidence sufficient to raise a serious question as to whether the USFWS had exercised control over the Lumber Companies and thereby engaged in "agency action." The letters dated March 15 and March 17, however,

were written by the state CDF, not the USFWS. The April 12 letter was a joint letter signed by both the CDFG and the USFWS. EPIC contends the following portion of this April 12 letter establishes the USFWS's discretionary involvement in, and control of, the proposed timber salvage operations:

The following are specific conditions that must be followed to comply with § 1038(b)(7) and with other [California] Board of Forestry Rules under the exemption, and avoid "take" of the identified species under the ESA. In addition to these measures, all other conditions of § 1038(b) must be implemented.

One of the specific conditions of the April 12 letter required the Lumber Companies, in order to avoid a "take" of northern spotted owls, to provide a written description of the procedures to be followed. "These procedures must be followed by a 'no-take' determination by the USFWS." As to the marbled murrelet, the April 12 letter also provided, "site specific consultation with USFWS and DFG is required prior to timber harvest operations."

Neither the CDF letters of March 15 and March 17, nor the joint CDFG-USFWS letter of April 12, provide evidence of federal involvement or control of the Lumber Companies' proposed harvesting operations. Although the April 12 letter refers to the California Board of Forestry Rules and the ESA as authority for the conditions the letter sets forth, nothing in the letter justifies an inference that the federal agency, the USFWS, has the authority to enforce California's laws or regulations. Rather, state law and regulations are cited to legitimate the state agency's authority and federal law is cited to legitimate the USFWS's authority. The April 12 letter lays down conditions in mandatory language, but there is no evidence that the USFWS had any power to enforce those conditions other than its authority under section 9 of the ESA, and this is not enough to trigger "federal action" under section 7. *Babbitt, Seneca*, 65 F.3d at 1511 n.15. When an agency "lacks the discretion to influence the private action" there is no "agency action." *Id.* at 1509.

Other communications between the USFWS and the Lumber Companies confirm that the USFWS was exercising authority drawn from its enforcement power under section 9 of the ESA. On July 18, 1995, another joint letter from the USFWS and the CDFG explained that the conditions set forth in the April 12 letter, were "intended to prevent a take of marbled murrelets." On March 3, 1995, in response

to a press release, the USFWS wrote to the Lumber Companies expressing concern that their proposed harvest operations might result in a "take" of marbled murrelet and explicitly referring to its power to institute an "enforcement action" under the ESA. This power emanates from section 9.

It is clear from the record that the USFWS merely provided advice on how the Lumber Companies could avoid a "take" under section 9 of the ESA. Protection of endangered species would not be enhanced by a rule which would require a federal agency to perform the burdensome procedural tasks mandated by section 7 simply because it advised or consulted with a private party. Such a rule would be a disincentive for the agency to give such advice or consultation. Moreover, private parties who wanted advice on how to comply with the ESA would be loath to contact the USFWS for fear of triggering burdensome bureaucratic procedures. As a result, desirable communication between private entities and federal agencies on how to comply with the ESA would be stifled, and protection of threatened and endangered species would suffer.

The record here establishes only that the USFWS provided advice under its power to enforce section 9 of the ESA. As a matter of law, such advisory activity does not constitute discretionary involvement or control over the Lumber Companies' proposed tree harvest operations. Thus, we conclude the district court erred in determining there was a serious question whether the USFWS engaged in "agency action" under section 7 of the ESA.

Nor is there a serious question whether the USFWS engaged in a "major federal action" under NEPA. NEPA requires federal agencies taking "major federal action significantly affecting the quality of the human environment" to assess the nature and extent of the action's environmental effects by preparing an Environmental Assessment and/or an Environmental Impact Statement. 42 U.S.C. § 4332(C); 40 C.F.R. §§ 1501.3, 1501.4, and 1502.4. "Major federal action" under NEPA includes activities "entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies." 40 C.F.R. § 1508.18(a).

The standards for "major federal action" under NEPA and "agency action" under the ESA are much the same. If there is any difference, case law indicates "major federal action" is the more exclusive standard. *Babbitt, Seneca,* 65 F.3d at 1512. Where, as here, there is no

"agency action" under what is probably the more liberal standard of the ESA, there is no "major federal action" under the more exclusive standard of NEPA.

III. CONCLUSION

The district court's grant of the preliminary injunction is reversed. The case is remanded to the district court for further proceedings in accordance with this opinion.

REVERSED and REMANDED.

APPENDIX H

NOT FOR PUBLICATION

MARBLED MURRELET *(Brachyramphus marmoratus)*; NORTHERN SPOTTED OWL *(Strix occidentalis caurina)*; ENVIRONMENTAL PROTECTION INFORMATION CENTER, INC.,
Plaintiffs,
v.
BRUCE BABBITT, Secretary, Department of the Interior; MOLLIE BEATTIE, Director, United States Fish and Wildlife Service; MICHAEL SPEAR, Region 1 Director, United States Fish and Wildlife Service; U.S. FISH AND WILDLIFE SERVICE, THE PACIFIC LUMBER COMPANY, a Delaware corporation; SCOTIA PACIFIC HOLDING COMPANY, a Delaware corporation; SALMON CREEK CORPORATION, a Delaware corporation,
Defendants.

No. C 95-3261 MMC

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

1996 U.S. Dist. LEXIS 13856

September 29, 1995, Filed

DISPOSITION: Preliminary injunction GRANTED.

COUNSEL: Thomas N. Lippe, Law Offices of Thomas N. Lippe, San Francisco, California, for the plaintiffs.

John Marshall, U.S. Dept. of Justice, for the federal defendants.

Jared G. Carter, Rawles, Hinkle, Carter, Behnke & Oglesby, Ukiah, California, for defendant Pacific Lumber Company.

JUDGES: Maxine M. Chesney, J.

OPINION BY: Chesney, Maxine M.

Plaintiffs' motion for preliminary injunction in this matter came on for hearing on September 22, 1995 at 9:00 a.m. and was continued to September 28, 1995 at 9:30 a.m. in this Court. Plaintiffs were represented by Thomas Lippe, Esq. of the Law Offices of Thomas N. Lippe. The federal defendants were represented by John Marshall, Esq., of the United States Department of Justice. Defendant Pacific Lumber Company was represented by Jared Carter, Esq., of Rawles, Hinkle, Carter, Behnke & Oglesby.

Plaintiffs move to enjoin pending trial Pacific Lumber Exemption Notices: No. 1-95EX-086 HUM, No. 1-94EX-1110 HUM (now replaced by 1-95-EX546 HUM), No. 1-94EX-1357 HUM. After hearing arguments, considering memranda and evidence presented to it by the parties, and issuing on the record Findings of Fact and Conclusions of Law, which are incorporated by reference herein, the Court further finds:

(1) With respect to their ESA claim, plaintiffs have raised questions serious enough to require litigation in their claim that: (a) the U.S. Fish and Wildlife Service exercised discretionary control over or acted as a permitting agency for these Notices of Exemption operations and thus engaged in "agency action" under §7 of the ESA (16 U.S.C. §1536(a)(2)) affecting an area in which species listed as endangered and threatened under the federal ESA (i.e. the marbled murrelet and the northern spotted owl) are present; (b) these allegations, if proven at trial, would require the Service to prepare a biological assessment based on the best scientific and commercial data available under §7(c) of the ESA (16 U.S.C. §1536(c)) and a biological opinion if that assessment determines that the project could jeopardize listed species under Section 7(b)(3)(A) (16 U.S.C. §1536(b)(3)(A)). *Pacific Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994). Under the ESA the balance of hardships weigh sharply in plaintiff's favor as a matter of law. (*Sierra Club v. March*, 816 F.2d 1376, 1382-1384 (9th Cir. 1987)).

(2) With respect to their NEPA claim, plaintiffs have raised questions serious enough to require litigation in their claims that the U.S. Fish and Wildlife Service exercised discretionary control over,

acted as a permitting agency for, or "enabled" these Notices of Exemption operations and thus engaged in "major federal action significantly affecting the quality of the human environment" under §102(2)(C) of NEPA (42 U.S.C. §4332(2)(C)), which, if proven at trial, would require the Service to prepare an environmental impact statement. Plaintiffs have also demonstrated the possibility of irreparable injury or, at a minimum, that serious questions are raised and the balance of hardships tips sharply in their favor. *Los Angeles Memorial Coliseum Com'n v. National Football League*, 634 F.2d 1197, 1201 (9th Cir. 1980); *see also, Alaska v. Native Village of Venetie*, 856 F.2d 1384 (9th Cir. 1988); *Grijalva v. Ilchert*, 815 F. Supp. 328 (N.D. Cal. 1993).

(3) The Court further finds that it is in the public interest to maintain the *status quo* until these issues are resolved at trial. Thus, plaintiffs are entitled to injunctive relief.

GOOD CAUSE APPEARING, IT IS HEREBY ORDERED:

Defendants Pacific Lumber Company, Scotia Pacific Holding Company and Salmon Creek Corporation are enjoined from conducting any timber operations pursuant to Exemption Notices No. 1-95EX-086 HUM, No. 1-94EX-1110 HUM, 1-95EX546 HUM and No. 1-94EX-1357 HUM pending further order of this Court after trial on the merits of this case, in the following geographic areas:

(1)	Bell/Lawrence Creek	T3N-R2E Sections 4 & 9
(2)	Shaw Creek	T4N-R2E Sections 33 & 34
(3)	Lower Shaw Creek	T3N-R2E Sections 21, 22, 27, 28
(4)	Elk Head Springs	T3N-R2E Sections 13, 14, 23, 24
(5)	Headwaters Forest	the entire area within Exemption Notice 1-95EX086 HUM
(6)	Allan Creek	T2N-R1E Sections 2, 11, 12
(7)	Yager Creek	T2N-R1E Section 11
(8)	Owl Creek	T2N-R2E Sections 11, 14, 15, 22, 23
(9)	Monument Creek/Eel Creek	T1N-R1E Sections 17, 18
(10)	Jordan Creek/Eel River	T1N-R1E Section 26
(11)	Booths Run	T3N-R2E Sections 9 & 10

(12) T.02N., R.01E. Humboldt Meridian: S1/2 Section 4, Section 7, Section 9, N1/2 Section 11, N1/2 Section 12, Section 18, Section 19, Section 26, Section 30.

(13) T.01N., R.01W. Humboldt Meridian: W1/2 Section 33.

(14) T.01N., R.01E. Humboldt Meridian: N1/2 Section 11, N1/2 Section 12, Section 26.

(15) T.01N., R.02E. Humboldt Meridian: Sections 10-12, N1/2 Section 13, N1/2 Section 14.

(16) T.01S., R.02W. Section 13, Section 24.

(17) T.01S., R.01W. Sections 2-4, E1/2 Section 5, S1/2 Section 7, Section 11, W1/2 Section 12, Sections 13-18, Sections 20-25, Section 27-29.

(18) T.01S., R.01E. SW1/4 Section 2, SE1/4 Section 3, Section 10, NW1/4 Section 11, E1/2 Section 19, S1/2 Section 20, E1/2 Section 28, Section 29, Section 30.

(19) T.01S., R.03E. Section 4, E1/2 Section 5, N1/2 Section 9, Section 10.

(20) T.02S., R.01W. S1/2 Section 11, S1/2 Section 12, Section 13, Section 14.

and within the area proposed for designation as Critical Habitat for the Marbled Murrelet by the U.S. Fish and Wildlife Service on August 10, 1995 at Federal Register Volume 60 No. 154 page 40946 as follows:

Map and description of CA-03-a taken from United States Fish and Wildlife Service 1:100,000 map; Eureka and Hayfork, California; 1995. Proposed Critical Habitat includes only Private lands described within the following areas:

T.02N., R.01E. Humboldt Meridian: Section 1-3; N1/2 Section 10; Section 1112.

T.02N., R.02E. Humboldt Meridian: Section 3; W1/2 Section 4; Section 5-6; N1/2 Section 7; N1/2 Section 8; Section 9-14; Section 15 except SW1/4; N1/2 Section 16; N1/2 Section 22; N1/2 Section 23.

T.03N., R.01E. Humboldt Meridian: S1/2 Section 3; Section 4-10; W1/2 Section 11; Section 13-18; W1/2 Section 19; Section

20-26; E1/2 Section 27; W1/2 Section 28; Section 29-35; Section 36 except NE1/4.

T.03N., R.02E. Humboldt Meridian: Section 3 except NE1/4; Section 4; SE1/4 Section 5; S1/2 Section 6; Section 7; Section 9; Section 10; W1/2 Section 16; Section 18-20; Section 21 except NE1/4; SW1/4 Section 22; Section 27; Section 28 except SW1/4; Section 29-30; Section 31 except SW1/4; Section 32; Section 33 except NW1/4.

T.04N., R.02E. Humboldt Meridian: S1/2 Section 33; SW1/4 Section 34.

SO ORDERED.

APPENDIX I

16 U.S.C. section 1540(g) [Citizen Suits]:

(1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf—

(A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof; or

(B) to compel the Secretary to apply, pursuant to section 1535(g)(2)(B)(ii) of this title, the prohibitions set forth in or authorized pursuant to section 1533(d) or 1538(a)(1)(B) of this title with respect to the taking of any resident endangered species or threatened species within any State; or

(C) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any such provision or regulation, or to order the Secretary to perform such act or duty, as the case may be. In any civil suit commenced under subparagraph (B) the district court shall compel the Secretary to apply the prohibition sought if the court finds that the allegation that an emergency exists is supported by substantial evidence.

(2)(A) No action may be commenced under subparagraph (1)(A) of this section—

(i) prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator of any such provision or regulation;

(ii) if the Secretary has commenced action to impose a penalty prusuant to subsection (a) of this section; or

(iii) if the United States has commenced and is diligently prosecuting a criminal action in a court of the United States or a State to redress a violation of any such provision or regulation.

(B) No action may be commenced under subparagraph (1)(B) of this section—

(i) prior to sixty days after written notice has been given to the Secretary setting forth the reasons why an emergency is thought to exist with respect to an endangered species or a threatened species in the State concerned; or

(ii) if the Secretary has commenced and is diligently prosecuting action under section 1535(g)(2)(B)(ii) of this title to determine whether any such emergency exists.

(C) No action may be commenced under subparagraph (1)(C) of this section prior to sixty days after written notice has been given to the Secretary; except that such action may be brought immediately after such notification in the case of any action under this section respecting an emergency posing a significant risk to the well-being of any species of fish or wildlife or plants.

(3)(A) Any suit under this subsection may be brought in the judicial district in which the violation occurs.

(B) In any such suit under this subsection in which the United States is not a party, the Attorney General, at the request of the Secretary, may intervene on behalf of the United States as a matter of right.

(4) The court, in issuing any final order in any suit brought pursuant to paragraph (1) of this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

(5) The injunctive relief provided by this subsection shall not restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or limitation or to seek any other relief (including relief against the Secretary or a State agency).